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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 221

SKELLY OIL COMPANY, ET AL., PETITIONERS,

vs.

PHILLIPS PETROLEUM COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 28, 1949.

CERTIORARI GRANTED OCTOBER 17, 1949.

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Caption omitted]

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 3751

SHELLY OIL COMPANY, a corporation; STANOLIND OIL AND GAS COMPANY, a corporation; and MAGNOLIA PETROLEUM COMPANY, a corporation, Appellants,

vs.

PHILLIPS PETROLEUM COMPANY, a corporation, Appellee

STIPULATION AND ORDER FOR ABBREVIATION OF PORTIONS OF THE RECORD TO BE PRINTED—September 18, 1948

It is hereby stipulated by and between the parties to the above entitled cause as follows:

(1) In the printing of the record on appeal certain of the exhibits attached to the pleadings of the respective parties and certain of the exhibits introduced in evidence by the respective parties, in case such exhibits shall be designated by either party to be printed, shall be abbreviated and condensed as set forth in the statements with respect thereto annexed hereto, in lieu of the printing of said exhibits in full. Portions of certain others of said exhibits shall not be printed, such omissions to be as set forth in the annexed statements. This stipulation shall apply only to such of said exhibits as one party or the other may designate to be printed.

(2) Subject to the approval of the court, the documents and papers to be so condensed or omitted, above referred to, shall be preserved by the court and may be referred to, if deemed necessary, by counsel in the briefs and arguments of the respective parties or otherwise during the disposition of the cause and may be considered by the court with the same force and effect as if printed in full.

[fol. 2] (3) In printing this stipulation as a part of the printed record the statements annexed hereto shall be

omitted as they will appear elsewhere at their respective proper places therein.

Dated this 14th day of September, 1948.

W. P. Z. German, One of counsel for Appellant, Skelly Oil Company. Charles L. Black, Ray S. Fellows, One of counsel for Appellant, Stanolind Oil and Gas Company. Dan Moody, One of counsel for Appellant, Magnolia Petroleum Company. Harry D. Turner, One of counsel for Appellee Phillips Petroleum Company.

Filed September 16, 1948.

So ordered: Orie L. Phillips, Chief Judge, United States Court of Appeals, Tenth Circuit.

September 18, 1948.

[fol. 3] IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

Pleas and Proceedings before the Honorable Royce H. Savage, United States District Judge in and for the Northern District of Oklahoma, presiding in the following entitled cause, to-wit:

PHILLIPS PETROLEUM COMPANY, a corporation, and MICHIGAN-WISCONSIN PIPE LINE COMPANY, a corporation, Plaintiff,

vs.

SKELLY OIL COMPANY, a corporation; STANOLIND OIL AND GAS COMPANY, a corporation; and MAGNOLIA PETROLEUM COMPANY, a corporation, Defendants

No. 2149-Civil

COMPLAINT—Filed July 15, 1947

1. The jurisdiction of this Court is founded on the existence of a Federal question and the amount in controversy. The action arises under the Natural Gas Act, 52 Stat. 821, et seq., 15 U.S.C.A. 717, et seq., as hereinafter more fully appears. The matter in controversy as between each plaintiff on the one hand and each defendant on the other exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

2. The plaintiff Phillips Petroleum Company (herein singularly referred to as "the plaintiff Phillips") is a corporation organized and existing under and by virtue of the laws of the State of Delaware and is duly authorized and qualified to do business in the State of Oklahoma, with its principal place of business in said State at Bartlesville. The plaintiff Michigan-Wisconsin Pipe Line Company (herein singularly referred to as "the plaintiff pipe line company") is a corporation organized and existing under and by virtue of the [fol. 4] laws of the State of Delaware. Each of the defendants Skelly Oil Company (herein singularly referred to as "the defendant Skelly") and Stanolind Oil and Gas Company (herein singularly referred to as "The defendant Stanolind") is a corporation organized and existing under and by virtue of the laws of the State of Delaware and is duly authorized and qualified to do business in the State of Oklahoma with its principal place of business in said State at Tulsa, at which place it owns substantial property and its officers may be found. The defendant Magnolia Petroleum Company (herein singularly referred to as "the defendant Magnolia") is a corporation organized and existing under and by virtue of the laws of the State of Texas and is duly authorized and qualified to do business in the State of Oklahoma, owning substantial property at Tulsa. Each of the defendants has appointed an agent for service of process within the State of Oklahoma in accordance with the statutes of that State, and particularly 18 Okl. Stats. 1941, Secs. 452, 453.

3. This action is brought under Section 274-D of the Judicial Code, 28 U.S.C. Sec. 400, because there is an actual controversy now existing between the parties arising out of the same transaction or occurrence and involving a question common to all parties, in respect of which each of the plaintiffs needs a declaration of its rights by this Court.

4. During and prior to the month of December, 1945, the plaintiff pipe line company was desirous of obtaining from the Federal Power Commission a certificate of public convenience and necessity under the requirements of the Natural Gas Act for a pipe line system which it proposed to construct and operate extending from a point in the State of Texas to points in the States of Michigan and Wisconsin, or either of them, and at intermediate points.

In order to obtain said certificate of public convenience and necessity it was necessary that said pipe line company have made available to it adequate reserves of natural gas. The plaintiff Phillips was during said month negotiating a contract with the plaintiff pipe line company pursuant to which the plaintiff Phillips would be obligated to make available to the plaintiff pipe line company reserves of [fol. 5] natural gas in the Hugoton Field, which field covers parts of the States of Kansas, Oklahoma, and Texas, including not only gas to be produced from the properties of the plaintiff Phillips but also gas which the plaintiff Phillips purchased from others.

5. On the 5th day of December, 1945, the plaintiff Phillips and the defendant Skelly entered into a written contract whereby the defendant Skelly contracted to sell to the plaintiff Phillips and said plaintiff contracted to buy gas to be produced by said defendant from properties of said defendant in said field, said properties consisting of leases covering approximately 46,528 acres of land. Also on said 5th day of December, 1945, the plaintiff Phillips and the defendant Stanolind entered into a written contract whereby the defendant Stanolind contracted to sell to the plaintiff Phillips, and said plaintiff contracted to buy gas to be produced by said defendant from properties of said defendant in said field, said properties consisting of leases covering approximately 118,000 acres of land. On the 7th day of December, 1945, the plaintiff Phillips and the defendant Magnolia entered into a written contract whereby the defendant Magnolia contracted to sell to the plaintiff Phillips, and the said plaintiff contracted to buy gas to be produced by said defendant from properties of said defendant in said field, said properties consisting of leases covering approximately 25,000 acres of land. A copy of each of said contracts is attached hereto (as explained below) and made a part hereof. In each of said contracts reference was made to the desire of the plaintiff pipe line company "to obtain from the Federal Power Commission a certificate of public convenience and necessity under the requirements of the Natural Gas Act for a pipe line system" which the plaintiff pipe line company proposed to construct and operate and to the proposed contract between the plaintiff pipe line company and the plaintiff Phillips whereby the latter was to become obligated to furnish gas reserves to the plaintiff pipe line company.

6. Thereafter and on December 11, 1945, the plaintiff Phillips did enter into a contract with the plaintiff pipe line company whereby the plaintiff Phillips contracted to supply the plaintiff pipe line company gas and obligated itself for [fol. 6] the furnishing of gas reserves, including the gas and properties covered by the said contracts of December 5, 1945, and the contract of December 7, 1945, between the plaintiff Phillips and the respective defendants. The contract between the plaintiff pipe line company and the plaintiff Phillips is attached hereto, marked "Exhibit 1" and made a part hereof. A copy of each of the above mentioned contracts between the plaintiff Phillips and the respective defendants was attached to said contract between the plaintiff pipe line company and the plaintiff Phillips and accordingly appears as a part of said Exhibit 1 attached to this complaint and made a part hereof. The contract between the plaintiff pipe line company and the plaintiff Phillips has not been terminated. In each of said contracts with the several defendants and in said contract between the plaintiff pipe line company and the plaintiff Phillips it appears, as is the case, that the plaintiff pipe line company has an interest in each of the said contracts with the several defendants in that the gas purchases and reserves provided for in said contracts were to be made available for said interstate pipe line system of the plaintiff pipe line company and were covered by the contract between the two plaintiffs. In addition to entering into said contract of December 11, 1945, with the plaintiff Phillips, the plaintiff pipe line company, pursuant to the terms and requirements of said Natural Gas Act, instituted proceedings before the Federal Power Commissioner to obtain a certificate of public convenience and necessity and did obtain such a certificate in accord with the requirements of said Act and the rules, regulations and procedure of said Federal Power Commission adopted and applied pursuant to said Act, and did so on November 30, 1946. This fact is disputed by the defendants, as will be more fully shown below.

7. In each of said contracts between the plaintiff Phillips and the several defendants, it is provided (Sec. 2, Art. II):

"If the proposed contract between Buyer and Michigan-Wisconsin Pipe Line Company is not consummated on or

before the first day of January, 1946, or if said contract is consummated and thereafter terminated upon the happen- [fol. 7] ing of one of the four contingencies hereinbefore quoted from said proposed contract, then and in either of those events either party shall have the right to terminate this contract by written notice to be delivered to the other party within thirty (30) days after the said first day of January, 1946, in case the said pipe line contract is not consummated, or within thirty (30) days after the termination of the pipe line contract as aforesaid; provided, however, that in the event this contract shall not be terminated for any of the foregoing reasons on or before October 1, 1946, and in the event Michigan-Wisconsin Pipe Line Company shall fail to secure from the Federal Power Commission on or before that date a certificate of public convenience and necessity for the construction and operation of its pipe line, Seller shall have the right to terminate this contract by written notice to Buyer delivered to Buyer at any time after December 1, 1946, but before the issuance of such certificate. Immediately upon the occurrence of any of the events or contingencies hereinbefore mentioned in this Section 2 or in the event of the termination by Buyer herein of its contract with Michigan-Wisconsin Pipe Line Company, Buyer herein shall give Seller herein notice thereof by telegram, to be confirmed by letter."

8. After an extensive hearing before it upon the application of the plaintiff pipe line company for a certificate of public convenience and necessity, the Federal Power Commission on November 30, 1946, made an order granting the application and issued said certificate of public convenience and necessity to the plaintiff pipe line company and caused notice thereof to be given on said date. The defendants, however, took the position that no certificate of public convenience and necessity was so issued and on December 2, 1946, each of the defendants sent to the plaintiff Phillips at Bartlesville, a telegram to that effect. The telegram sent by the defendant Skelly was as follows:

"Received today your telegram dated yesterday advising that certificate was issued to Michigan-Wisconsin Pipe Line Company on November thirtieth. We are informed at 4 o'clock Central Standard Time today that said certificate has not yet issued therefore we hereby exercise our [fol. 8] right under section two of Article two of the written

contract of December 5, 1945, between your company and Skelly Oil Company to terminate and we do hereby terminate said contract."

The telegram sent by the defendant Stanolind was as follows:

"Please refer to that certain contract, dated December 5, 1945, between Phillips Petroleum Company, as 'Buyer', and Stanolind Oil and Gas Company, as 'Seller', covering the sale and purchase of natural gas produced from certain leases owned by Stanolind Oil and Gas Company in Sherman and Hansford Counties, Texas, and Texas County Oklahoma, with particular reference to Section 2 of Article II thereof.

"You are hereby notified that Stanolind Oil and Gas Company hereby terminated the aforesaid contract of December 5, 1945, between Phillips Petroleum Company, as 'Buyer', and Stanolind Oil and Gas Company, as 'Seller', for the reason that Michigan-Wisconsin Pipe Line Company failed to secure, on or before October 1, 1946, a certificate of public convenience and necessity for the construction and operation of its pipe line and has not since secured such certificate."

The telegram sent by the defendant Magnolia was as follows:

"Under the terms of Section Two Article Two of contract dated December 7, 1945, between Phillips Petroleum Co. and Magnolia Petroleum Co. affecting certain gas leases located in Dallas, Hansford and Sherman Counties, Texas, and Texas County, Oklahoma, we hereby cancel said contract."

On December 3, 1946, plaintiff Phillips sent defendant Skelly the following telegram:

"Prior to December 2, 1946, Michigan-Wisconsin Pipe Line Company secured from the Federal Power Commission a certificate of public convenience and necessity for the construction and operation of its pipe line thereby precluding your right to terminate under Section 2 of Article [fol. 9] II of the contract of December 5, 1945, between Phillips Petroleum Company as buyer and Skelly Oil Company as seller covering the sale and delivery of natural gas. Your telegram of December 2, 1946, addressed to

F. E. Rice, Phillips Petroleum Company, purporting to terminate said contract does not operate to terminate or cancel said contract. Said contract remains in full force and effect and Phillips Petroleum Company will hold you to strict accountability for your failure to comply with the terms and provisions thereof."

On the same date plaintiff Phillips sent the defendants Stanolind and Magnolia an identical telegram except for the substitution of the names Stanolind Oil and Gas Company and Magnolia Petroleum Company, respectively, for the name Skelly Oil Company, and in the Magnolia telegram the deletion of the reference to F. E. Rice.

The defendants, and each of them, have asserted and now assert and claim in effect that no certificate of public convenience and necessity within the requirements of said Natural Gas Act was secured by the plaintiff pipe line company from said Federal Power Commission by the date of the defendants' said telegrams of December 2, 1946, and that accordingly each had the right to and did terminate its contract with the plaintiff Phillips and is no longer obligated by said contract. The defendants, and each of them claim that the actions and proceedings of said Federal Power Commission on November 30, 1946, and prior to the notice by the defendants to this plaintiff did not amount to the issuance by said commission of a certificate of public convenience and necessity, and refuse to recognize the actions of said Federal Power Commission on said date as being within the requirements of said Natural Gas Act pertaining to the issuance of certificates of public convenience and necessity. The plaintiffs, on the other hand, assert and here allege that prior to said notice of defendants to the plaintiffs Phillips a certificate of public convenience and necessity was issued by said Federal Power Commission to the plaintiff pipe line company consonant with and in compliance with the requirements of said Natural Gas Act and [fol. 10] with the rules, regulations and procedure of said Federal Power Commission under said Act and was a certificate of public convenience and necessity within the meaning of said Natural Gas Act and said contracts, and that the defendants have misconstrued, or refuse to recognize the provisions of said Natural Gas Act and the functions and actions of the Federal Power Commission acting under the terms of said Act. The plaintiffs allege that if said

Natural Gas Act, and the requirements thereof, be properly construed and applied and be given appropriate effect, the actions and proceedings of said Federal Power Commission prior to any notice to the plaintiff Phillips by any of the defendants did constitute the issuance to the plaintiff pipe line company by said commission of a certificate of public convenience and necessity "within the requirements of the Natural Gas Act" and as provided for in said contract and precluded any right on the part of any of the defendants to terminate its said contract between it and the plaintiff Phillips. The plaintiffs allege that none of the defendants has had, nor now has, any cause or right to terminate any of said contracts of December 5, 1945, or the said contract of December 7, 1945, and that all of said contracts are in full force and effect.

9. In order to preclude the defendants from breaching their respective contracts, and to establish the rights of the plaintiffs, and each of them, under said contracts whereby reserves for natural gas have been contracted for, the dispute and controversy between the parties should be settled by this Court and the rights of the parties be declared accordingly.

Wherefore, the plaintiffs pray:

1. That this Court decree that a certificate of public convenience and necessity was issued to the plaintiff pipe line company by the Federal Power Commission in accord with the requirements of the Natural Gas Act prior to any notice by the defendants, or any one of them, to the plaintiff Phillips of the termination of any of the contracts of December, 1945, between the plaintiff and the several defendants and, accordingly, that no defendant has any right [fol. 11] to terminate its contract entered into with the plaintiff Phillips;

2. That the contracts between the plaintiff Phillips and the defendants Skelly, Stanolind and Magnolia, respectively, each be decreed to be in effect and binding upon the parties thereto;

3. That by way of further relief the defendants, and each of them, be enjoined and restrained from further asserting, contending, claiming or alleging that a certificate of public convenience and necessity was not issued by the

Federal Power Commission to said pipe line company in accord with the requirements of the Natural Gas Act and said contracts of December 5, 1945, and December 7, 1945, and from asserting, claiming, or alleging that any of the defendants is not bound by its said contract with the plaintiff Phillips by reason of any cause heretofore arising; and

4. That the plaintiffs, and each of them, have judgment for their costs in this suit and for such other and further relief as may seem proper.

Don Emery, Rayburn L. Foster, R. B. F. Hummer, H. K. Hudson, George L. Sneed, Harry D. Turner, Attorneys for Plaintiff, Phillips Petroleum Company; Donald R. Richberg, Charles V. Shannon, Attorneys for Plaintiff, Michigan-Wisconsin Pipe Line Company.

Filed July 15, 1947.

EXHIBIT 1 TO COMPLAINT

This Contract, Made and entered into this 11th day of December, 1945 by and between Michigan-Wisconsin Pipe Line Company, a Delaware Corporation, with an office at [fol. 12] Detroit, Michigan, hereinafter referred to as "Buyer", and Phillips Petroleum Company, a Delaware corporation, with an office at Bartlesville, Oklahoma, hereinafter referred to as "Seller", Witnesseth:

Article I

The Project—Initial Procedure

1. Buyer represents that it proposes to construct and operate a gas pipe line system (herein referred to as the Pipe Line) extending from the point of delivery, specified in Article IV, in the Hugoton Gas Field in Hansford County, Texas, in a northeasterly direction to points of connection with distribution systems in Wisconsin and Michigan, or either of them, and at intermediate points, and that in order to assure a supply of natural gas for the Pipe Line Buyer desires to have dedicated and made available to the Pipe Line gas acreage having underlying commercially recoverable gas reserves as provided in this contract.

2. Seller represents that it owns, or controls by gas purchase contracts, valid and enforcable gas leases on the acreage in the Hugoton Field in Dallam, Sherman and Hansford Counties, Texas, and Texas County, Oklahoma, shown by crosshatching on the map hereto attached, marked Exhibit A, and by this reference made a part hereof, and that the gas leases owned by Seller and those controlled by Seller by gas purchase contracts are separately shown and identified on Exhibit A. Seller also represents that none of such gas leases is subject to any commitment in conflict with this contract, and that Seller is willing, subject to the provisions of this contract and to the reservations of gas herein provided, to make available to the Pipe Line the gas reserves underlying said acreage.

3. Buyer agrees to proceed with diligence in an endeavor to procure all governmental authority, permits and rights necessary for the construction and operation of the Pipe Line, and upon procuring the same, without the imposition of conditions therein unacceptable to Buyer, to proceed with diligence in the construction of the Pipe Line; provided, however, that Buyer shall not be obligated to commence the construction of the Pipe Line prior to the date [fol. 13] when the certificate of public convenience and necessity from the Federal Power Commission is no longer subject to review by the courts. However, upon the happening of any one of the following contingencies, to-wit:

(a) the failure of Buyer to procure from the Federal Power Commission, on or before September 1, 1946, a certificate of public convience and necessity for the construction and operation of the Pipe Line, or

(b) the issuance by the Federal Power Commission of an order refusing to grant a certificate of public convenience and necessity for the Pipe Line, or

(c) the failure of Buyer to commence the actual construction of the Pipe Line on or before March 1, 1947, or

(d) the failure of Buyer to commence, on or before January 1, 1948, the acceptance of deliveries of gas hereunder for delivery by Buyer for resale in one or more municipalities east of the Missouri River,

Seller shall have the right to terminate this contract by written notice to be delivered to Buyer not later than thirty days after the happening of such contingency.

4. Seller agrees that, upon commencement of construction of the Pipe Line, it will proceed with diligence in the drilling of wells on the acreage covered by its gas leases and the installation of facilities and will be ready to deliver gas under this contract whenever the Pipe Line is ready to receive the same, and that it will continue the drilling of wells and installation of facilities thereafter with diligence as needed for the performance of this contract. Seller further agrees that it will enforce similar provisions in its gas purchase contracts covered by this contract. However, upon the happening of any of the following contingencies, to wit:

(a) the failure of the Federal Power Commission, after the exercise of due diligence by Buyer, to grant prior to January 1, 1947, a certificate of public convenience and necessity to Buyer for the construction and operation of the Pipe Line, or

(b) the issuance by the Federal Power Commission of [fol. 14] an order refusing to grant a certificate of public convenience and necessity for the Pipe Line or granting such certificate with conditions or restrictions which are unacceptable to Buyer, or

(c) the failure of Seller to commence the drilling of wells and the installation of facilities for the delivery of gas hereunder within thirty days after Buyer shall have commenced the actual construction of the Pipe Line, or

(d) the failure of Seller to complete its facilities in readiness to deliver gas hereunder not later than the day on which Buyer shall have completed the Pipe Line in readiness to receive gas hereunder,

Buyer shall have the right to terminate this contract by written notice delivered to Seller not later than thirty days after the happening of such contingency.

5. The right of Seller or Buyer, as the case may be, to terminate this contract upon the happening of any of the contingencies described in Sections 3 and 4 of this Article I shall not exclude any rights and remedies such party

may have by reason of the other party's failure to proceed with diligence as above provided.

Article II

Availability of Gas

1. The term "gas" as used in this contract means natural gas produced from gas wells and does not include casinghead gas. The term "gas lease" as used in this contract means all rights in respect of gas produced from gas wells on acreage covered by gas leases or oil and gas leases or owned in fee, but does not include any rights in respect of crude oil or casinghead gas. The term "casinghead gas" as used above means gas produced from oil wells together with the crude oil and from the same formation or formations from which the crude oil is produced.

2. Seller represents that all the gas leases covered by this contract are for terms of stated periods of years and as long thereafter as oil or gas is produced in paying quantities from the lands covered thereby and that said [fol. 15] leases entitle the respective lessees to sell or dispose of all gas produced from the lands covered thereby, except in some cases gas reserved by the lessor for domestic use on the premises. Seller further represents that the acreage identified on Exhibit A as "Phillips Leased Acreage" is covered by gas leases owned by Seller and that the acreage identified on Exhibit A as "Phillips Contracted Acreage" is covered by valid and enforcible gas purchase contracts between various producers as sellers and Seller herein as buyer, a copy of each of which is hereto attached, marked Exhibit B, and by this reference made a part hereof. Subject to the possibility of termination of this contract as herein provided, Seller hereby dedicates to the Pipe Line and agrees to sell and deliver to Buyer all gas produced and saved from the acreage covered by this contract and shown on Exhibit A, excepting and reserving, however, the following volumes of gas: (1) all volumes of gas produced from any depths below sea level, (2) all volumes of gas used for the development and operation of the leases for the production of gas from depths above sea level and all volumes of gas reserved by the lessors for domestic purposes, (3) all volumes of gas lost by shrinkage due to removal from the gas of such products as Seller is required or entitled to

remove under the terms of this contract, (4) all volumes of gas used for the operation of Seller's processing plant or plants in which the gas delivered hereunder is processed and for the operation of facilities used for the delivery of the gas hereunder to Buyer, and (5) all other volumes of gas reserved by the terms of the gas purchase contracts set forth in Exhibit B.

3. Until Buyer shall have commenced acceptance hereunder of the minimum volumes of gas to be purchased by it as provided in Article III, Seller and the respective sellers under the gas purchase contracts shall have the right to produce from the lands covered by their respective gas leases and to use or sell to others than Buyer such volumes of gas as shall, in their respective judgments, be necessary to be produced to keep the gas leases in force and prevent drainage of gas from the acreage covered by this contract by wells owned by other operators. If any gas shall be so produced, Seller agrees that it will keep or cause to be kept ac- [fol. 16] curate account thereof and furnish Buyer in writing such information with respect thereto as Buyer shall reasonably request.

4. In respect of the gas leases owned by Seller and covered by this contract, Seller agrees to pay all delay rentals necessary to keep such gas leases in good standing and to continue the development of such gas leases as needed for the performance of this contract, but Seller shall not be required to drill more than one well to each six hundred forty acres, nor drill any wells which would not be drilled by a reasonably prudent operator under similar circumstances. Seller shall not be required to retain by payment of delay rentals acreage which, in its judgment, has been condemned by development, nor to retain any producing acreage which can no longer be operated at a profit, but before releasing any gas lease on any such a reage, Seller shall give Buyer timely notice that it proposes to release the same and, upon demand by Buyer, assign to Buyer such gas lease, upon payment by Buyer to Seller of the salvage value of any casing and other equipment of Seller in any well or wells located on the acreage covered thereby. Except as otherwise specifically provided in this contract, Seller agrees to keep the gas purchase contracts in full force and effect and to assert and defend, for Buyer's benefit, all of Seller's rights thereunder, and agrees that any gas leases

assigned to Seller as a result of the provisions contained in said gas purchase contracts shall become subject to the provisions of this contract to the same extent as Seller's gas leases. In the event Buyer shall, pursuant to the foregoing provisions, acquire any gas leases, Buyer shall have the right to take into the Pipe Line gas produced from the acreage covered by such leases and the maximum and minimum volumes specified in Sections 2 and 3 of Article III and all of Buyer's requirements as defined in Section 6 of Article III shall be reduced in like amount. In the event any of Seller's gas leases covering acreage lying within the area bounded by Line A shown on Exhibit A or any of the gas leases covered by the gas purchase contracts covering acreage lying within said area shall terminate and shall not be acquired by Buyer after timely notice and oppor-
[fol. 17] tunity to acquire as provided in this Section 4, and in the event Seller shall not, within six months after such termination, substitute therefor gas leases having no commitment in conflict with this contract and covering other acreage having underlying gas reserves and potential capacity to deliver gas at least equal to the underlying gas reserves and potential capacity to deliver gas of the acreage covered by such terminated gas leases, determined in the same manner as provided in Section 5 of this Article II, the maximum and minimum volumes specified in Sections 2 and 3 of Article III and all of Buyer's requirments as defined in Section 6 of Article III shall be reduced in the proportion that the acreage covered by such terminated leases bears to the total acreage covered by this contract and lying within said area.

5. It is understood that for the purpose of consolidating acreage subject to this contract Seller shall have the right to exchange any acreage subject to this contract for other acreage having no commitment in conflict with this contract and having underlying gas reserves and potential capacity to deliver gas at least equal to the underlying gas reserves and potential capacity to deliver gas of the acreage for which it is exchanged; provided, however, that no such exchange shall be made which will prevent Seller from furnishing gas to Buyer in accordance with the other provisions of this contract or diminish the amount of the gas reserves available to Buyer under this contract immediately prior to such exchange. In the event any acreage

substituted in such exchange for acreage covered by this contract shall be acreage controlled by Seller by gas purchase contract, such gas purchase contract or contracts shall contain terms substantially equivalent to the terms of the gas purchase contracts in Exhibit B. Before making any such exchange, Seller shall notify Buyer and, in the event the parties hereto shall be unable to agree concerning the volumes of the underlying gas reserves and the potential capacity to deliver gas of the acreages to be so exchanged, the determination of the volumes of such reserves and the potential capacity to deliver gas shall be made by an engineering firm to be selected by Seller from a list of three engineering firms to be designated by Buyer, [fol. 18] who shall be firms of high standing in their profession and experienced in the computation of gas reserves, and the determination made by such engineering firm shall be binding upon both parties hereto. The fee of such engineering firm shall be borne by Seller. Upon such exchange, the gas leases and gas purchase contracts, or either of the gas leases or gas purchase contracts, or either the gas leases or gas purchase contracts, covering acreage covered by this contract and so exchanged shall be released from all provisions of this contract and the gas leases and gas purchase contracts, or either the gas leases or gas purchase contracts, covering the acreage substituted therefor shall become subject to all the provisions of this contract.

6. Except as provided in Section 5 of Article III, Seller shall have the right at any time to deliver gas hereunder from any source or sources other than acreage covered by this contract and, in the event it shall do so, Seller shall have the right to produce or purchase from acreage covered by this contract equal volumes of gas and to use such gas or sell the same to others than Buyer. In such case the volumes of gas supplied from other sources and the volumes of gas produced from the acreage covered by this contract and so used or sold by Seller shall be carefully measured and, upon request by Buyer, Seller shall furnish to Buyer for examination all meter charts and pertinent data evidencing such volumes, use and sales. Buyer shall have access to the meters used to measure such gas to the same extent as meters used to measure gas delivered hereunder.

7. When, in order to deliver hereunder the maximum volumes of gas which Buyer is entitled to receive here-

under, it is necessary that the wells on the acreage covered by this contract be operated so that they produce the maximum volumes that may be legally produced therefrom, and if in order to produce from such wells such maximum volumes it is necessary to maintain an average working pressure on such wells of not to exceed forty pounds per square inch gauge, Seller, shall, if it has not previously done so, install and shall operate the requisite facilities to do so, but [fol. 19] Seller shall not be obligated to maintain an average working pressure on the wells on the acreage covered by this contract of less than forty pounds per square inch gauge.

8. It is specifically understood and agreed by the parties hereto that the volumes of gas that Seller shall be obligated to deliver to Buyer under the terms of this contract shall be limited to the volumes of gas which can be legally produced from the acreage covered by this contract less the volumes of gas excepted and reserved as provided in this contract.

9. In the event any law or any rule or regulation of any state or Federal authority having jurisdiction shall require Buyer to purchase a portion of all of its requirements of gas from other than Seller or shall make it necessary for Buyer to do so in order to obtain all of its requirements of gas, the maximum and minimum volumes specified in Sections 2 and 3 of Article III and all of Buyer's requirements as defined in Section 6 of Article III shall be reduced by a volume equal to such volume of gas as Buyer is so required to purchase during the time that Buyer shall be so required, and Seller shall have the right, concurrently with such purchases by Buyer, to use or sell to others than Buyer like volumes of gas produced from the acreage covered by this contract.

Article III

Sale and Purchase of Gas

1. Subject to the provisions of this contract, Seller agrees to sell and deliver to Buyer, and Buyer agrees to purchase and receive from Seller, all of Buyer's requirements of gas for the Pipe Line. Buyer anticipates that, by use of gas storage facilities in Michigan, Buyer will

be able during each twelve-month period after June 30, 1948, to purchase gas hereunder in substantially daily uniform volumes. Buyer agrees to use its best efforts to anticipate its yearly requirements for each twelve-month period after June 30, 1948, and on or before June 1, prior to the beginning of each such twelve-month period to advise Seller in writing as to the amount of gas it anticipates it will require daily during such twelve-month period. [fol. 20] Buyer agrees that during such twelve-month period it will purchase gas hereunder at as nearly 100% load factor as is reasonably possible in the operations of Buyer, but Buyer shall have the right, at intervals of not less than thirty days, to increase or decrease by not more than five per cent the daily amount of gas to be purchased hereunder by notifying Seller of such increase or decrease not less than thirty days prior to the effective date thereof. The right to increase or decrease the daily amounts of gas to be purchased by Buyer as provided in the preceding sentence shall be without prejudice to the rights set forth in Section 3 of this Article III, but in no case shall the daily amount of gas to be purchased hereunder exceed the maximum volumes which Seller is required to furnish under the provisions of Section 3 of this Article III nor, except as otherwise specifically provided in this contract, be less than the amounts specified in Section 2 of this Article III.

2. Subject to the provisions of this contract, Buyer agrees, beginning on July 1, 1948, to purchase and receive from Seller during each twelve-month period not less than the folowing average daily volumes of gas:

Year	Million Cubic Feet
Prior to July 1, 1948	No Minimum
July 1, 1948, to June 30, 1949	122
July 1, 1949, to June 30, 1950	132
July 1, 1950, to June 30, 1951	146
July 1, 1951, to June 30, 1952	160
July 1, 1952, to June 30, 1953, and each twelve-month period thereafter	255

3. The maximum volume of gas that Seller shall be required to sell and deliver to Buyer hereunder in any one day shall be as follows:

[fol. 21]

Year	Million Cubic Feet
Prior to July 1, 1948	158
July 1, 1948, to June 30, 1949	158
July 1, 1949, to June 30, 1950	173
July 1, 1950, to June 30, 1951	192
July 1, 1951, to June 30, 1952	203
July 1, 1952, to June 30, 1953, and each twelve-month period thereafter	343

provided that, as of any effective date specified by Buyer, Buyer shall have the right to specify an increased maximum volume of gas that Seller shall be required to sell and deliver to Buyer in any one day over and above that specified by the above schedule for such effective date, but not to exceed 343 million cubic feet, by giving Seller written notice, specifying the increased volume and the effective date thereof, not less than nine months prior to such effective date. The maximum daily volume so specified shall be in effect until the effective date of a greater maximum daily volume specified by Buyer or until exceeded by a volume specified in the above schedule. In the event the maximum daily volume shall be increased by Buyer as above provided, the minimum average daily volume of gas to be purchased by Buyer hereunder during each twelve-month period shall be the minimum specified in Section 2 of this Article III or a volume equal to seventy-four per cent of the maximum daily volume specified by Buyer as above provided, whichever is greater; provided that the effective date for the resulting increase in the minimum average daily volume to be purchased by Buyer shall be July 1 of the calendar year in which the effective date of any such increased maximum daily volume so specified by Buyer falls.

4. Buyer agrees that, beginning on July 1, 1948, in the event the total volume of gas purchased by Buyer from Seller hereunder during any twelve-month period from July 1 to June 30, inclusive, shall, through no fault of Seller or limitation imposed by law, be less than a volume equal to the minimum average daily volume required to be purchased by Buyer as herein provided multiplied by the num-

ber of days in such twelve-month period, the volume of gas [fol. 22] not so purchased by Buyer during any such twelve-month period shall be accepted and purchased by Buyer hereunder during the succeeding nine-month period and paid for at the price or prices applicable to the date or dates when such gas shall be delivered, and any such deficiency volume of gas not so accepted and purchased during such succeeding nine-month period shall be paid for by Buyer at the end of such succeeding nine-month period at the price provided in this contract applicable to the volume of gas delivered on the last day of the period in which the deficiency occurred. The deficiency volume of gas accepted and purchased by Buyer during any such nine-month period to make up deficiencies in purchases during the preceding twelve-month period shall be limited to the volume of gas accepted by Buyer from Seller under this contract during such nine-month period in excess of a volume of gas equal to the average daily minimum volume of gas to be purchased by Buyer during the twelve-month period of which such nine-month period is a part, multiplied by the number of days in such nine-month period; and such deficiency volume of gas accepted and purchased by Buyer during any such succeeding nine-month period to make up deficiencies in purchases during the preceding twelve-month period shall not be deemed to be a part of the minimum average daily volume of gas required to be accepted and purchased by Buyer hereunder during the twelve-month priod of which such nine-month period is a part.

5. If after development, as herein provided, of the gas reserves dedicated to the Pipe Line under this contract, the volumes of gas delivered hereunder by Seller to Buyer shall at any time be less than all of Buyer's requirements of gas and if, after written notice by Buyer to Seller specifying the day or days and the daily amount or amounts of such deficiency, such failure shall continue for a period of ninety consecutive days and Seller shall fail within said period to dedicate, in the same manner as provided in this contract, sufficient gas reserves to supply the deficiency volumes and upon such dedication to develop such reserves with due diligence, Buyer shall, to the extent of such deficiency volumes, be relieved of its obligation to purchase [fol. 23] from Seller all of Buyer's requirements of gas for

the Pipe Line, and shall have the right to supply the deficiency volumes from other sources; and, if the volumes supplied by Seller are less than the maximum specified in Section 3 of this Article III and if Buyer shall exercise such right, the minimum average daily volumes of gas to be purchased by Buyer and delivered by Seller under the provisions of Sections 2 and 3 of this Article III shall be reduced in the proportion that such deficiency volumes bear to such maximum volumes. The term "deficiency volumes" as used in this Section 5 is defined to mean a daily volume of gas equal to the maximum daily volume of the deficiency specified in said notice. Seller shall not, without Buyer's written approval, deliver any gas to Buyer during said ninety-day period for the purpose of supplying the deficiency, except gas produced from acreage subject to this contract.

6. The term "all of Buyer's requirements of gas" as used in this contract means all of Buyer's requirements of gas up to but not exceeding 343 million cubic feet in any one day, but shall not include any of Buyer's requirements in excess of 343 million cubic feet of gas in such day.

Article IV

Delivery Point

The point of delivery for all gas delivered hereunder shall be at the outlet of the meter station to be installed and operated by Seller at a location to be selected by Seller on or before March 1, 1946, within one mile of the southwest corner of Section 8, Block 1, Public Free School Land Survey, Hansford County, Texas. Upon selecting such location, Seller shall promptly advise Buyer thereof in writing.

Article V

Pressure

All gas sold and purchased hereunder shall be delivered at the delivery point above specified at the pressure available in Seller's facilities, but not less than two hundred pounds per square inch gauge.

[fol. 24] Article VI

Quality

1. All gas delivered by Seller under the terms of this contract shall conform to the following specifications:

(a) Odors and Solids. The gas shall be commercially free from objectionable odors, solid matter, dust, gums and gum-forming constituents which might interfere with its merchantability or cause injury to or interference with proper operation of the lines, regulators, meters or other appliances through which it flows.

(b) Oxygen. The gas shall not at any time have an oxygen content in excess of one per cent by volume, and Seller shall make every reasonable effort to keep the gas free of oxygen.

(c) Liquids: The gas shall be free of water and hydrocarbons in liquid form.

(d) Hydrogen Sulphide. The gas shall not contain more than one grain of hydrogen sulphide per one hundred cubic feet.

(e) Total Sulphur. The gas shall not contain more than twenty grains of total sulphur (hydrogen sulphide and mercaptan sulphur) per one hundred cubic feet.

(f) Heating Value. The gas shall have a total heating value per cubic foot of not less than nine hundred seventy, nor more than one thousand twenty British thermal units, the term "total heating value per cubic foot" meaning the number of British thermal units produced by the combustion, at constant pressure, of the amount of gas free from water vapor which would occupy a volume of one cubic foot at a temperature of sixty degrees Fahrenheit and under a pressure equivalent to that of thirty inches of mercury at thirty-two degrees Fahrenheit and under the standard gravitational force (the acceleration 980.665 c.m. per sec.) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of gas and air and when the water formed by [fol. 25] combustion is condensed to the liquid state. If the gas tendered for delivery by Seller to Buyer under this con-

tract shall have a total heating value per cubic foot of less than nine hundred seventy British thermal units, Seller shall at its own expense take such steps as shall be necessary to supply the deficiency in British thermal units.

2. Within the limits of the minimum heating value specification above, Seller shall have the right to remove from the gas delivered hereunder any constituents thereof other than methane, and shall have the right to remove such methane as is necessarily removed from the gas in the process of removing other constituents.

Article VII

Natural Gasoline Plant

In order to meet the exigencies of Seller's operating conditions, it is agreed that Seller shall, at its option, have the right to install its natural gasoline plant, for the extraction of hydrocarbons from the gas delivered hereunder, on the Pipe Line downstream from Buyer's initial compressor station which will be located at or near the delivery point above specified. Not more than six months nor less than four months prior to the anticipated date of commencement of construction of the Pipe Line, Buyer shall notify Seller of such date, and Seller shall within thirty days thereafter notify Buyer in writing of Seller's election as to the location of such natural gasoline plant. In the event such plant shall be located downstream from Buyer's said initial compressor station.

(a) The specifications in Article VI in respect of Odors and Solids, Oxygen, Hydrogen Sulphide and Total Sulphur shall be applicable to the gas at the delivery point above specified, and the specifications in respect of Liquids and Heating Value shall be applicable to the gas at the discharge of Seller's said natural gasoline plant.

(b) Seller shall install and maintain metering equipment in such manner as to measure all volumes of gas lost by shrinkage in the natural gasoline plant and Buyer's initial [fol. 26] compressor station due to extraction of hydrocarbons, and the volume of gas, if any, taken from the Pipe Line and used as fuel in said natural gasoline plant. Seller shall also install and maintain all devices and equipment

reasonably necessary to control, and insofar as possible eliminate, pulsations affecting the accuracy of such metering equipment. Seller shall from time to time consult with Buyer with respect to the type, design and efficiency of such devices and equipment.

(c) In computing the volume of gas to be paid for by Buyer hereunder, the volume of gas lost by shrinkage in the natural gasoline plant and Buyer's initial compressor station due to extraction of hydrocarbons, and the volume of gas, if any, taken from the Pipe Line and used as fuel in said natural gasoline plant shall be deducted from the total volume of gas delivered to Buyer at the delivery point above specified.

(d) Such natural gasoline plant and the appurtenant equipment installed by Seller shall be designed, constructed and operated to receive the gas after the same shall have passed through Buyer's initial compressor station, at the operating pressure on the Pipe Line, not to exceed nine hundred twenty-five pounds per square inch gauge pressure, and to process the gas and return it into Buyer's facilities with a loss in pressure not to exceed ten pounds per square inch gauge, and at a temperature within five degrees Fahrenheit of the temperature at which the gas is received by Seller at the discharge of Buyer's initial compressor station.

(e) As reimbursement to Buyer for the cost of excess compression required by reason of Seller's natural gasoline plant and facilities, and for the cost of compression of the volume of gas lost by shrinkage in the natural gasoline plant and Buyer's initial compressor station due to extraction of hydrocarbons and compression of the volume of gas, if any, taken from the Pipe Line and used as fuel in said natural gasoline plant, Seller agrees to pay to Buyer one cent per one thousand cubic feet of the volume of gas lost by shrinkage in the natural gasoline plant and [fol. 27] said compressor station due to extraction of hydrocarbons and the volume of gas, if any, taken from the Pipe Line and used as fuel in said natural gasoline plant, all such volumes to be determined as above provided. The sums due from Seller to Buyer each month under the terms

of this subsection (e) shall be deducted from the statement from Seller to Buyer for gas purchased during such month.

(f) Seller shall be entitled to all hydrocarbons removed from the gas through the operation of Buyer's initial compressor station.

(g) Seller shall indemnify Buyer and hold it harmless of and from any and all cost or liability due to the construction, maintenance or operation of Seller's said natural gasoline plant and appurtenant facilities and the possession of, or the handling or loss of, the gas from the time it is received by Seller at the discharge of Buyer's initial compressor station until it is returned to Buyer's facilities.

Article VIII

Price

1. Buyer agrees to pay to Seller for all gas delivered hereunder five cents per one thousand cubic feet for all gas delivered during the first five years after the time of first delivery of gas hereunder; and at the end of the first five-year period after the time of first delivery the price for all such gas delivered during the following five-year period shall be five and seven-tenths cents per one thousand cubic feet; and at the end of the second five-year period after the time of first delivery the price for all such gas delivered during the following five-year period shall be six and four-tenths cents per one thousand cubic feet; and at the end of the third five-year period and each succeeding five-year period, the price for all such gas delivered during the following five-year period either (1) shall be increased one cent per one thousand cubic feet, or (2) shall be the weighted average price, considering pressure, then being paid for gas sold and delivered to all gas transmission companies from the Panhandle Field and the Hugoton Field, whichever of [fol. 28] (1) or (2) is the higher. The words "considering pressure" as used in this Section 1 have reference to the delivery pressure of the gas and to the pressure of gas used in the computation of volumes for the application of the price provisions. For the purposes of this Section 1, the first five-year period after the time of first delivery of gas hereunder shall include the remainder of the calendar month in which

tne five-year period ends. The beginning and end of succeeding five-year periods shall be computed from the end of such calendar month.

2. In order to protect the parties hereto from too great burden under the price provisions of this contract in the event of abnormal inflation or deflation of prices of commodities generally, it is agreed that in the event of the happening of the contingencies hereinafter mentioned, an adjustment of the prices to be paid by Buyer to Seller for gas hereunder shall be made as herein provided. Using as a standard the Federal Bureau of Labor's Statistical Annual Index of Wholesale Prices of all Commodities, based upon 1926 prices as 100% and defining the word "point" as used herein to mean 1% of the 1926 prices, it is agreed that no adjustment shall be made unless and until the said Annual Index shall be more than thirty points above or below the level indicated by said Annual Index on the date of this contract (hereinafter referred to as the present level), and unless and until Buyer, and distributors which buy at least fifty per cent of all gas sold to Buyer to distributors for resale, shall have had a general increase or decrease in their respective rates for gas sold by them. However, if, when the said Annual Index is more than thirty points above the present level, the Federal Power Commission, and other authorities having jurisdiction, shall grant to Buyer and such distributors a general increase in their respective rates for gas sold by them, it shall be conclusively presumed that such increase is due to inflation and the prices for gas hereunder shall be increased in proportion to the increase in Buyer's rates; and if, when the said Annual Index is more than thirty points below the present level, said Commission, and other authorities having jurisdiction, shall require a general decrease in the rates for [fol. 29] gas sold by Buyer, and distributors which buy at least fifty per cent of all gas sold by Buyer to distributors for resale, it shall be conclusively presumed that such decrease is due to deflation and the prices for gas hereunder shall be reduced in proportion to the decrease in Buyer's rates. Further proportionate adjustments in the prices hereunder shall be made in the same manner whenever a general increase or decrease in the rates of Buyer and such distributors shall be put into effect; provided, that whenever the

said Annual Index shall be not more than thirty points above or below the present level, the prices hereinabove specified shall again be in effect. Each published Annual Index shall apply from the beginning of the calendar month next following its publication until the beginning of the calendar month next following the publication of the next published Annual Index. Buyer agrees that, whenever the said Annual Index shall be more than thirty points above the present level, it will diligently pursue all rights and remedies to which it is entitled in a good faith endeavor to bring about, and procure the approval of, an increase or successive increases, as the case may be, in its rates to bring it rates up to the inflated price levels.

Article IX

Taxes

Seller shall pay all property taxes on its leases and facilities and all present gross production taxes, severance taxes and other excise taxes upon or in respect of the gas delivered hereunder up to the point of delivery of the gas to Buyer. All increases in such present gross production taxes, severance taxes and excise taxes upon or in respect of the gas delivered hereunder or the production, transportation or handling thereof up to the point of delivery of the gas to Buyer required to be paid by Seller or by the sellers under the gas purchase contracts shall be borne one-fourth by Seller or by such sellers, as the case may be, and three-fourths by Buyer. Excise taxes as used in this paragraph shall not include any taxes based on income, profits or the right to exercise the corporate franchises of Seller or the sellers under the gas purchase con- [fol. 30] tracts, all of which and all increases of which shall be paid by Seller or the sellers under the gas purchase contracts.

Article X

Units of Volume

1. The unit of volume of gas for all purposes hereunder (except for computation of heating value under the provisions of Article VI and the computation of volumes for the application of the price provisions of Article VIII and

the computation of volumes for the application of the provisions of Article VII) shall be on one cubic foot at an absolute pressure of fourteen and seven hundred thirty-five thousandths pounds per square inch at a temperature of sixty degrees Fahrenheit, computed in accordance with Boyle's Law governing pressure and volume of gases (with corrections for deviation as hereinafter provided).

2. The unit of volume for the application of the price provisions of Article VIII and the computation of volumes for the application of the provisions of Article VII shall be one cubic foot of gas at an absolute pressure of sixteen and four-tenths pounds per square inch at a temperature of sixty degrees Fahrenheit.

Article XI

Standards of Measurements and Tests

1. The volume of gas delivered hereunder shall be computed in accordance with the methods prescribed in Gas Measurement Committee Report No. 2, Natural Gas Department, American Gas Association, including the Appendix thereto, as published May 6, 1935.

2. The deviation of the gas from Boyle's Law at the pressures and temperatures at which the gas is metered shall be determined by tests or analyses at intervals of three months. The method of making such tests or analyses shall be determined by mutual agreement, but in the event of the inability of the parties to agree, shall be made by a laboratory selected by the parties whose tests or analyses shall be accepted as final. The results of each such determination shall be used in computing the volumes [fol. 31] of gas delivered hereunder during the three calendar months next following the taking of the sample from which such determination is made.

3. The specific gravity of the gas delivered hereunder shall be determined by the method prescribed in American Petroleum Institute Code No. 50-A at the beginning of delivery and thereafter once each month, on or within five days after the first day of each calendar month, at the respective points where the gas is metered hereunder, and the results of the determination at each such point shall

be used in computing the volumes of gas metered at such point during such calendar month.

4. The flowing temperature of the gas in the meters shall be determined by means of a recording thermometer to be installed on the upstream side of Seller's meter and the arithmetic average temperature each day shall be used in computing the deliveries of gas during such day.

5. The heating value of the gas delivered hereunder shall be determined by means of a recording calorimeter using the Thomas principle of calorimetry or its equal.

Article XII

Measurement

1. Seller shall install, maintain and operate at its own expense, equipment required for the measurement of the volumes, temperatures and heating values of all gas delivered hereunder. Buyer shall have access to such measuring equipment at all reasonable hours, but the calibrating and adjusting thereof and the changing of charts shall be done only by Seller. Seller shall mail to Buyer for checking and calculation all volume and temperature meter charts used in the measurement of gas delivered hereunder within five days after the last chart for each billing period is removed from the meter. Such charts shall be mailed to Seller within five days after receipt thereof by Buyer.

2. Buyer may install, maintain and operate such check measuring equipment as it shall desire.

3. Seller and Buyer shall each have the right to be pres- [fol. 32] ent at the time of any installing, testing, cleaning, changing, repairing, inspecting, calibrating, or adjusting, done in connection with the measuring equipment of the other used in measuring deliveries hereunder, and shall be given reasonable notice thereof in order that it may be present.

4. If for any reason Seller's measuring equipment is out of service or out of repair so that the quantity of gas delivered is not correctly indicated by the reading thereof, the gas delivered through the period such measuring equipment is out of service or out of repair shall be estimated and

agreed upon on the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check measuring equipment if installed and accurately registering; or

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculations; or

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

5. The accuracy of the measuring equipment at the place of delivery shall be verified at reasonable intervals, and whenever requested by Buyer. If any such verification shall be requested by Buyer and, upon such verification, the measuring equipment shall be found to be registering correctly, the cost of such verification shall be charged to, and borne by, Buyer; otherwise the cost of all such verifications shall be borne by Seller.

6. If, upon any test, measuring equipment is found to be not more than two per cent fast or slow, previous readings of such equipment shall be considered correct in computing the deliveries of gas hereunder, but such equipment shall be adjusted properly at once to record accurately. If, upon any test, any measuring equipment shall be found to be inaccurate by an amount exceeding two per cent, then any previous readings of such equipment shall be corrected to zero error for any period which is known definitely or agreed upon, but in case the period is not [fol. 33] known definitely or agreed upon such correction shall be for a period covering the last half of the time elapsed since the date of the last test, but not exceeding a period of fifteen days.

7. Both Seller and Buyer shall cause to be preserved for a period of at least six years all test data, charts and other similar records.

Article XIII

Statements and Payments

Seller shall render to Buyer on or before the tenth day of each calendar month a statement for all gas delivered to

Buyer hereunder during the preceding calendar month and payment for such gas shall be made by Buyer to Seller on or before the twenty-fifth day of the month during which such statement is rendered.

Article XIV

Estimates of Requirements

In order to enable Seller to conduct its operations properly, Buyer shall notify Seller each month of its estimates of requirements of gas during each of the following six months, which estimates shall not be inconsistent with the provisions of this contract. Buyer shall use its best judgment and experience in arriving at such estimates, but shall not be bound by the quantities thereof.

Article XV

Warranty

Seller warrants unto Buyer the title to all gas delivered hereunder.

Article XVI

Force Majeure

Neither party shall be liable for any failure of performance due to causes beyond its control; provided, that no cause shall relieve Buyer of its obligation to make payment for gas delivered hereunder.

[fol. 34]

Article XVII

Term

Unless terminated prior to delivery of gas hereunder as provided in Article I hereof, this agreement shall remain in force and effect from the date hereof and thereafter as long as gas shall be produced from the acreage covered by the gas leases and gas purchase contracts covered by this contract in paying quantities from depths above sea level, or until the amount of gas available to Buyer hereunder shall be so reduced that further operation of the Pipe Line shall, in Buyer's judgment, no longer be profitable to Buyer and such operation shall be discontinued.

Article XVIII

Miscellaneous

1. No waiver by either party of any one or more defaults by the other in the performance of any of the provisions of this contract shall operate or be construed as a waiver of any other or further default or defaults, whether of a like or of a different character.

2. On request of Buyer, Seller shall furnish Buyer in writing with such information as Seller may possess with respect to the gas wells located on the acreage covered by this contract, their production history, their capacity to produce, pressures, flow characteristics, and any other information relating to the wells or to the acreage covered by this contract which Buyer may reasonably specify.

3. Except as herein otherwise provided, any notice, request, demand, statement or bill provided for in this contract, or any notice which either party may desire to give to the other, shall be in writing and shall be considered as duly delivered when mailed by registered mail to the post office address of either of the parties hereto, as the case may be, as follows:

Seller: Phillips Petroleum Company, Bartlesville, Oklahoma.
[fol. 35] Buyer: Michigan-Wisconsin Pipe Line Company, 415 Clifford Street, Detroit, Michigan

or at such other address as either party shall designate by formal written notice. Routine communications, including monthly statements and payments, shall be considered as duly delivered when mailed by either registered or ordinary mail.

4. Each party shall have the right to examine at reasonable times the books, records and charts of the other party to the extent necessary to verify the accuracy of any statement, charge, computation or demand made under or pursuant to any of the provisions of this contract.

5. Except as provided in Article VII, Seller shall be deemed to be in control and possession of the gas deliverable hereunder and responsible for any damage or injury

caused thereby until the same shall have been delivered to Buyer at the point of delivery, after which delivery Buyer shall be deemed to be in exclusive control and possession of the gas and responsible for any injury or damage caused thereby.

6. The term "day" as used herein shall mean a period of twenty-four consecutive hours beginning and ending at seven o'clock A. M. Central Standard Time or such other standard time as shall be in effect at the point of delivery hereinabove specified.

7. This contract and the respective obligations of the parties hereunder are subject to present and future valid laws and valid orders, rules and regulations of duly constituted authorities having jurisdiction.

8. The terms and provisions hereof shall extend to and be binding upon the parties hereto, their assigns and successors in interest.

In Witness Whereof, Michigan-Wisconsin Pipe Line Company has caused its name to be hereunto subscribed by its president or a vice president thereunto duly authorized and its corporate seal to be affixed and attested by its secretary or an assistant secretary, and Phillips Petroleum [fol. 36] Company has caused its name to be hereunto subscribed by its agent thereunto duly authorized, on the date first above set forth.

Michigan-Wisconsin Pipe Line Company, by Frank L. Conrad, President. (Corporate Seal.)

Attest: W. I. Brown, Assistant Secretary; Phillips Petroleum Company, by A. M. Rippel, Agent.

[Map, Exhibit A, to the foregoing contract is omitted by stipulation of parties to this appeal.]

[Exhibit B to Foregoing Contract]

Contract

This Contract entered into this 5th day of December, 1945, by and between Phillips Petroleum Company, a Dela-

ware corporation with an operating office at Bartlesville, Oklahoma, hereinafter referred to as "Buyer", and Skelly Oil Company, a Delaware corporation with an office at Tulsa, Oklahoma, hereinafter referred to as "Seller";

Witnesseth:

Michigan-Wisconsin Pipe Line Company, a Delaware corporation, with an office at Detroit, Michigan, desires to obtain from the Federal Power Commission a certificate of public convenience and necessity under the requirements of the Natural Gas Act for a pipe line system which it proposes to construct and operate extending from a point of delivery in Hansford County, Texas, in a northeasterly direction to points of connection with distribution systems in Michigan and Wisconsin, or either of them, and at intermediate points, and in order to obtain said certificate it is necessary that it have made available to it, adequate reserves of natural gas.

[fol. 37] Buyer represents to Seller that Buyer is now in the process of negotiating a contract with said Michigan-Wisconsin Pipe Line Company pursuant to which Buyer herein will be obligated to make available to said pipe line company the aforesaid required reserves of natural gas, by dedicating to said pipe line company the reserves of natural gas accumulated, at depths above sea level, in and under leases belonging to Buyer and in and under leases belonging to others with whom Buyer may enter into contracts for the purchase of natural gas, which leases are situated in Dallam, Sherman and Hansford Counties, Texas, and in Texas County, Oklahoma, and which comprise a part of the so-called Hugoton Gas Field (which gas field covers approximately 2,500,000 acres of land in Kansas, Oklahoma and Texas). In and by the said contract between Buyer herein and said pipe line company, said pipe line company will agree to purchase its requirements of gas up to 343 million cubic feet per day (at 14.735 pounds and 60° F.) from Buyer in said area.

It is proposed that the said contract, hereinafter referred to as the "pipe line contract," in which Phillips Petroleum Company is designated as "Seller" and Michigan-Wiscon-

sin Pipe Line Company is designated as "Buyer," will contain, among others, the following provisions:

"• • • Upon the happening of any one of the following contingencies, to wit:

(a) The failure of Buyer to procure from the Federal Power Commission, on or before September 1, 1946 a Certificate of Public Convenience and Necessity for the construction and operation of the Pipe Line, or

(b) The issuance by the Federal Power Commission of an order refusing to grant a Certificate of Public Convenience and Necessity for the Pipe Line, or

(c) The failure of Buyer to commence the actual construction of the Pipe Line on or before March 1, 1947, or

(d) The failure of Buyer to commence on or before January 1, 1948, the acceptance of deliveries of gas here- [fol. 38] under for delivery by Buyer for resale in one or more municipalities east of the Missouri River,

Seller shall have the right to terminate this contract by written notice to be delivered to Buyer not later than thirty (30) days after the happening of such contingency."

Seller represents that it is the owner of valid and subsisting oil and gas leases or gas leases covering approximately 46,548 acres of land (hereinafter referred to as "the acreage covered hereby") in Sherman and Hansford Counties, Texas, all of which said lands are shown as indicated by legend on the map hereto attached, marked "Exhibit A" and by this reference made a part hereof. The acreage covered hereby is only a portion of the gas acreage owned by Seller in the Hugoton Field.

Buyer is desirous of dedicating to Michigan-Wisconsin Pipe Line Company the gas reserves above sea level in and underlying the acreage covered hereby and a portion of its own acreage and other acreage cover- by gas purchase contracts entered into by Buyer with other lease owners in Dallam, Sherman and Hansford Counties, Texas, and Texas County, Oklahoma (all of which is hereinafter referred to as the "dedicated acreage").

Now, therefore, in consideration of the sum of Ten Dollars ($10.00) in hand paid by Buyer to Seller and other good and valuable considerations, the receipt and suffici-

ency whereof is hereby acknowledged, and, further, in consideration of the mutual benefits and advantages flowing to Seller and to Buyer hereunder, the parties hereto agree as follows:

Article I

Sale and Purchase of Gas

Section 1. Subject to and in accordance with the terms of this contract, Seller agrees to sell and deliver to Buyer and Buyer agrees to purchase and pay for all natural gas produced from depths above sea level from the acreage covered hereby up to Seller's ratable portion of Buyer's requirements for supplying Michigan-Wisconsin Pipe Line Company under the pipe line contract, provided, however, [fol. 39] that, until Buyer shall commence deliveries of gas under the pipe line contract, Seller shall have the right to use or sell to others than Buyer such volumes of gas as shall, in Seller's judgment, be necessary to be produced to comply with all of the express and implied covenants and conditions of Seller's leases or any thereof, and thereafter Seller may use or sell to others any surplus gas available from Seller's wells or any thereof over and above 250 per cent of the average daily volume of gas taken by Buyer from such well or wells during the preceding six calendar months, but any arrangement for any sale or disposition by Seller of such surplus gas available from any well or wells shall be subject to the prior right of Buyer to take from such well or wells at any time or from time to time, upon 30 days written notice to Seller, the total volume of gas that may legally be produced from such well or wells; and provided further that, in any event Seller shall have the right to use such volumes of gas produced from the acreage covered hereby as shall be required for the development and operation of said acreage for oil and gas purposes and to supply to Seller's lessors such volumes of gas as may be reserved to and taken by such lessors for domestic purposes.

Section 2. Buyer shall take natural gas from the wells on the acreage covered hereby ratably with its takes of natural gas from all other wells on dedicated acreage. It is recognized and agreed that in taking natural gas ratably Buyer will be unable, due to varying operating conditions, to withdraw natural gas in exact ratable proportions during any specific month, but Buyer agrees, that, to the best

of its ability, by balancing excesses against deficiencies during a period of reasonable duration, it will maintain a ratable proportion of withdrawals from the acreage covered hereby as compared with withdrawals from other lands and leaseholds as hereinbefore provided. Buyer shall advise Seller from time to time, and at any time when requested by Seller, as to the formula used by Buyer to determine the ratable taking of gas hereunder. If and when Buyer makes any change in the formula so used, it shall forthwith inform Seller thereof. Except during such times [fol. 40] as a state or federal regulatory body or authority having jurisdiction shall be regulating and prorating the gas production from that part of the Hugoton Field in which the dedicated acreage is located and shall be furnishing the producers with proration schedules which show the information provided for below, Buyer shall furnish Seller each month a statement showing (1) the ratable standing at the end of the preceding calendar month of each well from which Buyer is required to take gas ratably hereunder, (2) the ratable volume each such well was entitled to produce during such month and all supporting detail necessary to enable Seller to determine the ratable standing of each such well, (3) the volume of gas delivered from each such well during such preceding month, and (4) the ratable production of each well during the month in which such statement is rendered to supply the anticipated markets for such month.

Section 3. Buyer agrees that to the extent that the volumes of gas which can be lawfully produced from wells that are at the time drilled on the dedicated acreage (after deduction of volumes lost by shrinkage in the treatment by Buyer of said gas to bring it within the specifications of the gas to be delivered to the pipe line company and the extraction of gasoline and other products therefrom as may be permitted by the pipe line contract and volumes used for development and operation of the dedicated acreage and the operation of Buyer's facilities through which the gas is delivered to Michigan-Wisconsin Pipe Line Company) shall be sufficient to supply all of Michigan-Wisconsin Pipe Line Company's requirements for gas under the pipe line contract, Buyer will supply such requirements of gas to the pipe line company from the dedicated acreage.

Article II

Term

Section 1. Unless sooner terminated as hereinafter provided in Section 2 of this Article II, this agreement shall remain in force and effect from the date hereof and thereafter as long as the oil and gas leases or gas leases on the acreage covered hereby remain in force and effect and [fol. 41] gas shall be produced from such leases from depths above sea level, or until the amount of gas available to Michigan-Wisconsin Pipe Line Company shall be so reduced that further operation of the pipe line shall, in the judgment of the owner and operator thereof, no longer be profitable to such owner and operator and the operation of said pipe line has been discontinued.

Section 2. If the proposed contract between Buyer and Michigan-Wisconsin Pipe Line Company is not consummated on or before the first day of January, 1946, or if said contract is consummated and thereafter terminated upon the happening of one of the four contingencies hereinbefore quoted from said proposed contract, then and in either of those events either party shall have the right to terminate this contract by written notice to be delivered to the other party within thirty (30) days after the said first day of January, 1946, in case the said pipe line contract is not consummated, or within thirty (30) days after the termination of the pipe line contract as aforesaid; provided, however, that, in the event this contract shall not be terminated for any of the foregoing reasons on or before October 1, 1946, and in the event Michigan-Wisconsin Pipe Line Company shall fail to secure from the Federal Power Commission on or before that date a certificate of public convenience and necessity for the construction and operation of its pipe line, Seller shall have the right to terminate this contract by written notice to Buyer delivered to Buyer at any time after December 1, 1946, but before the issuance of such certificate. Immediately upon the occurrence of any of the events or contingencies hereinbefore mentioned in this Section 2 or in the event of the termination by Buyer herein of its contract with Michigan-Wisconsin Pipe Line Company, Buyer herein shall give Seller herein notice thereof by telegram, to be confirmed by letter.

Article III

Delivery Point

Section 1. The point of delivery for all gas purchased and sold hereunder shall be at the mouths of the respective wells on the acreage covered hereby.

[fol. 42] Section 2. In so far as Seller is able to convey such rights, Buyer shall have and it hereby is granted an easement and servitude on the acreage covered hereby for installing, operating and maintaining equipment used in conjunction with the measurement and removal of gas purchased and sold hereunder, shall have the right to operate, inspect and test such equipment at any time and shall have free access at all times to any part of Seller's leaseholds for any purpose connected with any matter or thing covered by this contract.

Section 3. Seller shall be deemed to be in control and possession of the gas deliverable hereunder and responsible for any damage or injury caused thereby until said gas shall have been delivered to Buyer at the delivery points, after which delivery Buyer shall be deemed to be in exclusive control and possession of the gas and responsible for any injury or damage caused thereby.

Article IV

Definitions

For the purpose of this contract only:

1. The terms "gas" and "natural gas" shall mean natural gas produced from gas wells from depths above sea level and shall not include casinghead gas.

2. The term "gas lease" shall mean all rights in respect of gas produced from gas wells under gas leases or oil and gas leases or from fee lands, but does not include any rights in respect of crude oil or casinghead gas.

3. The term "casinghead gas" as hereinbefore used shall mean gas produced from oil wells together with the crude oil and from the same formation or formations from which the crude oil is produced.

4. The term "ratably" as used herein means taking or producing the volume of gas necessary to be taken or pro-

duced from any developed unit in order to produce such unit without discrimination and proportionately with other developed units, as determined by valid statutes and regulatory orders, or, in the absence of such statutes or regu- [fol. 43] latory orders, by a proper engineering formula giving weight to acreage, said formula to be selected by Buyer after consultation with Seller.

Article V

Availability of Gas

Section 1. Seller represents that the acreage covered hereby and indicated as Seller's acreage by legend on the map hereto attached as "Exhibit A" is owned in fee or covered by conventional gas leases for terms of stated periods of years and as long thereafter as oil or gas is produced in paying quantities from the lands covered thereby and that said leases authorize the lessees named therein, their successors and assigns, to sell or dispose of all gas produced and saved from the lands covered thereby except that, in some cases, gas is reserved by the lessor for domestic use on the premises.

Section 2. Seller agrees to pay all delay rentals (without liability to Buyer for inadvertent failure so to do in any case) necessary to keep the gas leases on the acreage covered hereby in good standing and to develop said leases in such manner and with such diligence as to enable it to make delivery of gas to Buyer as provided in this contract, but Seller (a) shall not be required to drill more than one well to each six hundred forty (640) acres of the acreage covered hereby, (b) shall not be required to drill any well which would not be drilled by a reasonably prudent operator under similar circumstances, (c) shall not be required to retain by payment of delay rentals any acreage which, in its judgment, has been condemned by development, and (d) shall not be required to retain any producing acreage which can no longer be operated at a profit; provided, however, that before releasing any acreage which has been condemned, in the judgment of Seller, or any producing acreage that can no longer be operated at a profit, or before permitting any lease to expire through intentional nonpayment of delay rentals, Seller shall notify Buyer in writing sixty (60) days in advance of any such proposed action and, upon demand in writing by Buyer within fifteen (15)

days after receipt of such notice, Seller shall assign to Buyer the gas rights as to the depths above sea level under [fol. 44] Seller's leases, insofar as said leases cover such acreage upon payment by Buyer to Seller of the salvage value of any casing and other equipment in the well or wells completed to a depth above sea level located thereon, if any. Seller agrees that it will use its best efforts to renew expiring leases on acreage covered hereby which, in the judgment of Seller, will be productive of gas in paying quantities if drilled and Seller agrees, further, that, except as otherwise provided in this Article V, it will not release any of its leases as to depths above sea level on the acreage covered hereby without the written consent of Buyer; provided, however, that Seller shall not be required to pay any unreasonable or exorbitant prices to renew any of its leases.

Section 3. Buyer agrees that it will give Seller prompt notice in writing of the commencement by Michigan-Wisconsin Pipe Line Company of the actual construction of the line for which provision is made in the pipe line contract and, upon receipt of said notice, Seller shall proceed with diligence in an endeavor to procure any and all governmental authority, permits and rights that may be necessary for the drilling of wells on the acreage covered hereby that are then needed for the performance of this contract and, upon the procurement thereof, Seller shall proceed with diligence in the development of said acreage to the end that it may be in a position to make delivery of gas as contemplated by this contract commencing with the first deliveries by Buyer under the pipe line contract. Upon the commencement of operations for the drilling of any well on the acreage covered hereby, Seller shall notify Buyer in writing as to the location of such well and the estimated number of days that will be required to complete the same. Upon completion of said well Seller shall forthwith advise Buyer in writing as to the production encountered, if any, setting forth the daily volume or volumes thereof as reflected by any test or tests that may be required by the Railroad Commission of Texas. Buyer shall complete the installation of all necessary lines, measuring stations and other equipment required to connect each well drilled on the acreage covered hereby and begin taking natural gas from each such well within sixty (60) days from the date of receipt of notice that Seller has completed such well [fol. 45] as a producer of natural gas in commercial quanti-

ties; provided, however, that Buyer shall neither be required to connect to any well nor to purchase or take any natural gas from the wells drilled on the acreage covered hereby prior to its initial delivery of gas to Michigan-Wisconsin Pipe Line Company under the pipe line contract.

Section 4. Buyer agrees that, without cost or expense to Seller, it will construct, install, maintain and operate, or cause to be constructed, installed, maintained and operated, gathering facilities and equipment (including such gas compressing equipment as may be necessary from time to time) adequate and sufficient in size and capacity to enable it at all times to receive and take Seller's gas ratably as provided in Section 2 of Article I hereof. In the event Buyer should at any time be unable to take from Seller's wells or any thereof Seller's said ratable quantities of gas as contemplated by this contract, either because of the inadequacy of the gathering lines or compressing facilities of Buyer or because of decline in the natural well pressure of Seller's wells or any thereof, then Buyer agrees that, with due diligence, it will construct or cause to be constructed additional or enlarged facilities to the extent necessary to take and receive Seller's said ratable quantities of gas.

Section 5. Buyer shall not be obligated

(a) to connect to any well of Seller, or

(b) to reconnect to any well of Seller from which Buyer, under the provisions of this contract, has disconnected and from which it has removed the meter and gathering facilities serving that well only.

unless, in the case of either (a) or (b), said well has the ability to produce a daily average volume of 100,000 cubic feet of natural gas per day at the end of seventy-two (72) hours' flow against a back pressure at the well equal to 80% of the closed-in wellhead pressure of such well; provided, however, that if Buyer elects not to connect or reconnect to any such well, as the case may be, Buyer nevertheless shall, upon Seller's request, connect therewith and accept gas from any such well if Seller shall bear the cost of the facilities, including lines, valves and the meter neces- [fol. 46] sary to deliver and measure the gas from such well into the nearest point on Buyer's gathering system

against the working pressure therein. Buyer shall not be required to continue taking natural gas from, and Buyer shall have the right to disconnect from, any well of Seller when the natural shut-in well pressure of such well drops below fifty (50) pounds. If, after Seller shall have made such tests or taken such remedial measures with respect to any well drilled by Seller on the acreage covered hereby as a reasonably prudent operator, under the same or similar circumstances, would make or take in a good faith effort to comply with this contract, and Buyer has not connected or reconnected therewith and is not obligated under the provisions of this contract to connect or reconnect therewith, then Seller shall have the right, free of this contract, to use or to sell to others than Buyer any gas thereafter produced from such well, and at any time thereafter on Seller's written request Buyer shall release the said well, together with the surrounding acreage which constitutes the unit on which said well is located, from all of the obligations of this contract.

Section 6. For the purpose of consolidating acreage:

(a) Seller shall have the right to exchange any acreage subject to this contract for other dedicated acreage.

(b) Seller shall have the right to exchange acreage subject to this contract not held by wells connected to Buyer's gathering system for any other acreage within Area B, as shown on "Exhibit A," not dedicated to Michigan-Wisconsin Pipe Line Company but having no commitment in conflict with this contract which has underlying gas reserves and potential capacity to deliver gas at least equal to the underlying gas reserves and potential capacity to deliver gas of the acreage for which it is exchanged; provided that, before making any such exchange, Seller shall notify Buyer and, in the event the parties hereto shall be unable to agree concerning the volumes of the underlying gas reserves and the potential capacity to deliver gas of the acreage to be so exchanged; the determination of the volumes of such reserves and the potential capacity to deliver gas shall be made by a competent engineer or competent engineering firm selected by Buyer and approved by [fol. 47] Seller, such engineer or engineering firm to be of high standing in his or its profession and experienced in the computation of gas reserves and the determination so made

shall be binding upon both parties hereto; the fee of such engineer or engineering firm shall be paid by Seller.

Upon such exchange the gas leases on acreage covered hereby and so exchanged shall be released from all provisions of this contract and the gas leases covering the acreage substituted therefor shall become subject to all of the provisions of this contract.

Section 7. Buyer shall not decline to take the gas from any well of Seller for the sole reason that said gas contains more than one grain of hydrogen sulphide per hundred cubic feet or more than twenty grains of total sulphur (hydrogen sulphide and mercaptan sulphur) per hundred cubic feet.

Article VI

Quality

Section 1. All gas delivered by Seller under the terms of this contract shall conform to the following specifications:

(a) Solids. The gas delivered at each delivery point shall be commercially free from solid matter, dust, gums and gum-forming constituents which might interfere with its merchantability or cause injury to or interference with proper operation of the lines, regulators, meters or other appliances through which it flows.

(b) Oxygen. The gas delivered at each delivery point shall not have an oxygen content in excess of one per cent (1%) by volume at any time and Seller shall make every reasonable effort to keep the gas free of oxygen.

(c) Heating Value. The composite of all of the gas delivered hereunder during each calendar month at all delivery points shall have a total heating value per cubic foot of not less than 970 B.t.u.'s and the gas delivered hereunder from each well shall have a total heating value per cubic foot of not less than 930 B.t.u.'s. The term "total heating value per cubic foot" shall mean the number of [fol. 48] B.t.u.'s produced by the combustion, at constant pressure, of the amount of gas saturated with water vapor which would occupy a volume of one cubic foot at a temperature of 60° F. and under a pressure equivalent to that of 30 inches of mercury at 32° F. and under the

standard gravitational force (the acceleration 980.665 c.m. per sec.) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of gas and air and when the water formed by combustion is condensed to the liquid state.

Section 2. Buyer shall have the right to reject any gas delivered from any well which does not meet the specifications of subparagraph (a) or (b) of Section 1 above or which has a total heating value per cubic foot of less than 930 B.t.u.'s. If and whenever the total heating value per cubic foot of the composite of all of the gas delivered hereunder during any calendar month at all delivery points shall be less than 970 B.t.u.'s the takes of gas from those wells having the lowest heating value shall be so adjusted, and from time to time readjusted, as to make the total heating value per cubic foot of the composite not less than 970 B.t.u.'s. In the event deliveries of gas shall be discontinued from any well pursuant to the provisions of the preceding sentence hereof for a continuous period of one year, or in the event Buyer shall reject the gas from any well pursuant to the first sentence of this Section 2, and if, by diligent effort by Seller, the gas from any such well is not made acceptable to Buyer, Seller shall thereafter have the right to use or sell the gas from any such well to others free of this contract and upon Seller's written request the acreage allocated to said well shall be released from this contract.

Article VII

Price

Section 1. Buyer agrees to pay to Seller:

(a) The sum of four cents (4c) per thousand cubic feet for all gas conforming to the specifications in subparagraphs (a) and (b) of Article VI above and having a total heating value per cubic foot of not less than 970 B.t.u.'s, [fol. 49] and containing not more than one grain of hydrogen sulphide per hundred (100) cubic feet and not more than twenty grains of total sulphur (hydrogen sulphide and mercaptan sulphur) per hundred (100) cubic feet delivered hereunder during the first five (5) years following the date of the first delivery of gas under this contract; the sum of four and one-half cents (4½c) per thousand cubic feet for all such gas delivered hereunder during the second five-

year period following the date of the first delivery of gas under this contract; the sum of four and three-fourths cents (4¾¢) per thousand cubic feet for all such gas delivered hereunder during the ten-year period following the expiration of the first ten years after date of first delivery of gas under this contract; the sum of five cents (5¢) per thousand cubic feet for all such gas delivered hereunder during the ten-year period following the expiration of fweuty years after date of first delivery of gas under this contract; thereafter the price for such gas delivered hereunder shall be increased one cent (1¢) per thousand cubic feet at the beginning of each ten-year period.

(b) The sum of three and one-half cents (3½¢) per thousand cubic feet for all gas conforming to the specifications in subparagraphs (a) and (b) of Article VI above and having a total heating value per cubic foot of not less than 970 B.t.u.'s and containing more than one grain of hydrogen sulphide per hundred (100) cubic feet or more than twenty grains of total sulphur (hydrogen sulphide and mercaptan sulphur) per hundred (100) cubic feet delivered hereunder during the first five (5) years following the date of the first delivery of gas under this contract; the sum of four cents (4¢) per thousand cubic feet for all such gas delivered hereunder during the second five-year period following the date of the first delivery of gas under this contract; the sum of four and one-fourth cents (4¼¢) per thousand cubic feet for all such gas delivered hereunder during the ten-year period following the expiration of the first ten years after date of first delivery of gas under this contract; the sum of four and one-half cents (4½¢) per thousand cubic feet for all such gas delivered hereunder during the ten-year period following the expiration of twenty years after date of first delivery of gas under this [fol. 50] contract; thereafter the price for such gas delivered hereunder shall be increased one cent (1¢) per thousand cubic feet at the beginning of each ten-year period.

(c) For all gas produced from each well and delivered hereunder having a total heating value per cubic foot of less than 970 B.t.u.'s, the price per thousand cubic feet shall be the price specified in subparagraph (a) or (b) above which would have been applicable to such gas if such gas had had a total heating value per cubic foot of not less than 970 B.t.u.'s, less one-hundredth of one cent (.01

of 1¢) per thousand cubic feet for each one (1) B.t.u. that the total heating value per cubic foot of such gas is less than 970.

Section 2. That this contract may not become burdensome to either party should the price of commodities in general become abnormally inflated or deflated, it is agreed that, in the happening of the contingencies hereinafter mentioned, an adjustment of the prices to be paid by Buyer to Seller for gas delivered hereunder shall be made as herein provided. Using as a standard the Federal Bureau of Labor's Statistical Annual Index of Wholesale Prices of all Commodities, based upon 1926 prices as one hundred per cent (100%) and defining the word "point" as used herein to mean one per cent (1%) of the 1926 prices, it is agreed that no adjustment shall be made unless and until the said Annual Index shall be more than thirty (30) points above or below the level indicated by said Annual Index on the date of this contract (hereinafter referred to as "the present level") and unless and until Michigan-Wisconsin Pipe Line Company and distributors which buy at least fifty per cent (50%) of all gas sold by said pipe line company to distributors for resale shall have had a general increase or decrease in their respective rates for gas sold by them. If, however, when the said Annual Index is more than thirty (30) points above the level indicated by said Annual Index on the date of this contract, the Federal Power Commission and/or other authorities having jurisdiction shall grant to Michigan-Wisconsin Pipe Line Company and such distributors a general increase in their respective rates for gas sold by them, it shall be con- [fol. 51] clusively presumed that such increase is due to inflation and the prices for gas hereunder shall be increased in proportion to the increase in Michigan-Wisconsin Pipe Line Company's rates; and if, when the said Annual Index is more than thirty (30) points below the present level, said Commission and/or other authorities having jurisdiction shall require a general decrease in the rates for gas sold by Michigan-Wisconsin Pipe Line Company and distributors which buy at least fifty per cent (50%) of all gas sold by said pipe line company to distributors for resale, it shall be conclusively presumed that such decrease is due to deflation and the prices for gas hereunder shall be reduced in proportion to the decrease in said pipe line company's

rates. Further proportionate adjustments in the prices hereunder shall be made in the same manner whenever a general increase or decrease in the rates of Michigan-Wisconsin Pipe Line Company and such distributors shall be put into effect; provided, however, that whenever the said Annual Index shall be not more than thirty (30) points above or below the present level, the prices hereinbefore specified shall again be in full force and effect. Each published Annual Index shall apply from the beginning of the calendar month next following the publication until the beginning of the calendar month next following the publication of the next published Annual Index. Buyer agrees that, whenever the said Annual Index shall be more than thirty (30) points above the present level, it will use its best efforts to induce Michigan-Wisconsin Pipe Line Company to diligently pursue all rights and remedies to which the latter is entitled in a good faith endeavor to bring about and procure the approval of, an increase, or successive increases, as the case may be, in its rates to the end that said rates may be brought up to the inflated price levels.

Article VIII

Taxes

Seller shall pay all present and future property taxes on its leases and facilities, except future increases in gross production taxes levied in lieu of property taxes, and shall pay all gross production taxes, severance taxes and other [fol. 52] excise taxes levied at the rates now existing upon or in respect of the gas delivered hereunder up to the point of delivery of the gas to Buyer. Buyer represents that Buyer's proposed contract with Michigan-Wisconsin Pipe Line Company will provide that the latter shall assume three-fourths (¾) of all increases above the present rates of gross production taxes, severance taxes and excise taxes upon or in respect of the gas delivered hereunder and taken by said pipe line company or upon or in respect of the production or handling thereof and Buyer hereby agrees to bill Michigan-Wisconsin Pipe Line Company for, and to remit to Seller, such three-fourths (¾) of any such increases in taxes required to be paid by Seller and to assume three-fourths (¾) of all increases above the present rates of such taxes upon or in respect of the gas delivered hereunder and disposed of in other markets or used by

Buyer. It is agreed that the remaining one-fourth (¼) of all such increases shall be borne by Seller herein. The term "excise taxes" as used in this section shall not include any taxes based on income, profits or the right to exercise the corporate franchise of Seller, all of which and all increases in which shall be paid by Seller.

Article IX

Standards of Measurements and Tests

Section 1. The volume of gas delivered hereunder shall be computed in accordance with the methods prescribed in Gas Measurement Committee Report No. 2, Natural Gas Department, American Gas Association, including the Appendix thereto, as published May 6, 1935, except as otherwise provided in Section 2 of this Article IX.

Section 2. The volume of gas delivered hereunder shall be computed on a pressure basis of 16.4 pounds per square inch absolute at a base temperature of 6° F. For the purpose of measurement the gas shall be assumed to obey Boyle's Law, the atmospheric pressure shall be assumed to be 13.2 pounds per square inch and the flowing temperature of the gas shall be assumed to be 60° F.; provided, however, that Buyer may, at its option, install a recording thermometer or thermometers to record the temperature of gas [fol. 53] flowing through meters, in which event the arithmetic average of the daily temperature at any meter each chart period shall be used in computing the volumes of gas measured through such meter during such period. The basis of measurement of all gas for the purpose of determining ratable takes under the provisions of Section 2 of Article I shall be that provided in this Section 2 of Article IX.

Section 3. The heating value of the gas delivered hereunder from each well shall be determined by tests by Buyer, at intervals of not less than one year, in Buyer's laboratory by means of a recording calorimeter using the Thomas principle of calorimetry or its equal or by other means acceptable to both parties hereto. Buyer shall furnish to Seller a written report of all such tests and, in the event any such report shall indicate the heating value of the gas from any well or wells covered by this contract to be less

than 970 B.t.u.'s per cubic foot, Seller shall have the right, by written notice to Buyer, to require a retest to be made of the gas from such of Seller's wells as in Seller's opinion may be necessary for the protection of its interests under any provisions of this contract. Upon receipt of such notice, Buyer shall notify Seller in writing of the time at which samples will be taken and tests will be made for such retest and Seller shall have the right to have representatives present at the taking of such samples and the making of such tests. The results of any such retest shall be used in lieu of the disputed test. If and when the gas from any well shall be retested as above provided and the heating value of such gas shall be determined by such retest to be less than 970 B.t.u.'s per cubic foot, Buyer shall thereafter notify Seller in writing before making any subsequent regular determination of the heating value of the gas from such well and Seller shall have the right to have representatives present at the taking of samples of such gas and the making of the test, but further retests shall not be required. The results of each test shall be used until the next successive test is made.

Section 4. Tests taken for the purpose of determining ratable takes hereunder as provided in Section 2 of Article [fol. 54] I shall be taken on all connected wells annually during the months of July, August and September. Tests of each newly completed well and of each well not connected at the time of the last annual test shall be made within thirty (30) days following the connection thereof. Advance notice of the date upon which each and every such test is to be made shall be given to Seller that the latter may have representatives present to witness such tests. Retest of any well shall be made upon the written request of either party hereto. Advance notice of the making of such retest shall be given as above provided.

Article X

Measurement

Section 1. Buyer shall install, maintain and operate at its own expense all equipment required for the measurement of volumes, temperatures and heating value of all gas delivered hereunder. Seller shall have access to such measuring equipment at all reasonable hours, but the cali-

brating and adjusting thereof and the changing of charts shall be done only by Buyer. Buyer shall mail or deliver to Seller for checking and calculation all volume and temperature meter charts used in the measurement of gas delivered hereunder within five (5) days after the last chart for each billing period is removed from the meter. Such charts shall be mailed or returned to Buyer within five (5) days after receipt thereof by Seller.

Section 2. Seller may install, maintain and operate such check measuring equipment as it shall desire.

Section 3. Buyer and Seller shall each have the right to be present at the time of any installing, testing, cleaning, changing, repairing, inspecting, calibrating, or adjusting done in connection with the measuring equipment of the other used in measuring deliveries hereunder. The party performing such work shall give the other party hereto reasonable notice of the time and place such work shall be performed that the latter may have a representative or representatives present if it so desires.

Section 4. If, for any reason, Buyer's measuring equipment is out of service or out of repair with the result that [fol. 55] the quantity of gas delivered is not correctly indicated by the reading thereof, the gas delivered through the period such measuring equipment is out of service or out of repair shall be estimated and agreed upon on the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check measuring equipment if installed and accurately registering;

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculations; or

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the metering equipment was registering accurately.

Section 5. The accuracy of the measuring equipment at all places of delivery shall be verified at reasonable intervals and whenever requested by Seller. If any such verification shall be requested by Seller and, upon verification, the measuring equipment shall be found to be registering

correctly, the cost of such verification shall be charged to and borne by Seller; otherwise the cost of all such verifications shall be borne by Buyer.

Section 6. If, upon any test, measuring equipment is found to be not more than two per cent (2%) fast or slow, previous readings of such equipment shall be considered correct in computing the deliveries of gas hereunder, but such equipment shall forthwith be adjusted to record accurately. If, upon any test, any measuring equipment shall be found to be inaccurate by an amount exceeding two per cent (2%), then and in that event any previous readings of such equipment shall be corrected to zero error for any period which is known definitely or agreed upon, but in case the period is not known definitely or agreed upon, such correction shall be for a period covering the last half of the time elapsed since the last test, but not exceeding a period of fifteen (15) days.

Section 7. Each party hereto shall preserve or cause to be preserved for a period of at least six (6) years all test data, charts or other similar records.

[fol. 56]

Article XI

Payments

On or before the 25th day of each calendar month during the term hereof, Buyer shall pay Seller for all gas delivered hereunder during the preceding calendar month. Such payments shall be accompanied by a statement reflecting the volumes of gas delivered to Buyer from each well on the acreage covered hereby.

Article XII

Estimates of Requirements

Buyer agrees that on or before January 15 of each year Buyer shall notify Seller in writing of the volumes of gas that Buyer estimates it will require during each of the first six months of such calendar year and on or before July 15 of each calendar year Buyer shall notify Seller in writing of the volumes of gas that Buyer estimates it will require during each of the last six months of such calendar year. Buyer shall use its best judgment and experience in arriving at such estimates, but shall not be bound thereby.

Article XIII

Warranty

Seller warrants unto Buyer the title to all gas delivered hereunder.

Article XIV

Force Majeure

Neither party hereto shall be liable for any failure of performance due to strikes or lockouts or to causes of any kind or character beyond its control; provided, however, that no cause shall relieve Buyer of its obligation to make payment to Seller for all gas delivered hereunder and meeting the specifications hereinbefore set forth. If either party hereto shall be unable to perform on account of any such cause such party shall give the other party notice thereof in writing or by telegraph as soon as possible after the occurrence of the cause relied on and also shall give the other party like notice of the cessation of said cause.

[fol. 57]

Article XV

Miscellaneous

Section 1. No waiver by either party of any one or more defaults by the other party in the performance of any of the provisions of this contract shall operate or be construed as a waiver of any other or further default or defaults, whether of a like or of a different character.

Section 2. All notices that are required or authorized to be given hereunder except as otherwise specifically provided herein shall be given in writing by United States Mail or Western Union Telegram, postage or charges prepaid, and addressed to the party to whom such notice is given, as follows:

Seller: Skelly Oil Company, Tulsa, Oklahoma.

Buyer: Phillips Petroleum Company, Bartlesville, Oklahoma.

The originating notice to be given under any provision hereof shall be deemed given only when received by the party to whom such notice is directed and the time for such party to give any notice in response thereto shall run from the date the originating notice is received. The second or any

subsequent responsive notice shall be deemed given when deposited in the United States Post Office or with Western Union Telegraph Company with the postage or charges prepaid.

Section 3. Each party shall have the right at all reasonable times to examine the books, records and charts of the other party to the extent necessary to verify the accuracy of any statement, charge, computation or demand made under or pursuant to any of the provisions of this contract.

Section 4. The term "day" as used herein shall mean a period of twenty-four consecutive hours beginning and ending at 7:00 o'clock A. M. Central Standard Time or such other standard time as shall be in effect at the points of delivery hereinbefore specified.

Section 5. This contract is made subject to and in contemplation of all applicable valid laws of the states of [fol. 58] Texas and Oklahoma and of the United States of America and all valid rules, orders and regulations promulgated by any lawfully constituted authority having jurisdiction in the premises. Each party hereto shall be entitled to presume the validity of all orders, rules, regulations and laws of any authority purporting to have jurisdiction in so far as the same apply to such party or its performance hereunder.

Section 6. The terms, provisions and conditions hereof shall extend to, be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

In Witness Whereof this contract is executed in duplicate, each copy for all purposes to be deemed an original, the day and year first above written.

Phillips Petroleum Company, by F. E. Race. Vice-President. (Corporate Seal.)

Attest: R. E. Arnold, Assistant Secretary.

Skelly Oil Company, by Chester C. Herndon, Vice-President. (Corporate Seal.)

Attest: F. T. Hopp, Secretary.

The map attached to the foregoing contract is omitted by stipulation of the parties to this appeal.

Also attached, as part of Exhibit B, to the contract between Michigan-Wisconsin Pipe Line Company and Phil-

lips Petroleum Company were three additional contracts in each of which Phillips Petroleum Company, a Delaware corporation with an operating office at Bartlesville, Oklahoma, was designated as "Buyer", one in which Stanolind Oil and Gas Company, a Delaware corporation with an office at Tulsa, Oklahoma, was designated as "Seller", one in which Magnolia Petroleum Company, a Texas corporation with an office at Dallas, Texas, was designated as [fol. 59] "Seller", and one in which United Producing Company, Inc., a Maryland corporation with an office at Charleston, West Virginia, was designated as "Seller". The printing of said three contracts is omitted by the stipulation of the parties to this appeal. The introductory portions of said contracts (those portions from the beginning of the contracts down to Article I), Article II, Section 2, and Article XV, of those three contracts are the same as the corresponding portions of the foregoing contract between Phillips Petroleum Company and Skelly Oil Company, dated December 5, 1945, and the other provisions thereof are substantially the same as those in the Phillips-Skelly contract, with these exceptions:

a. The contract between Phillips Petroleum Company and Magnolia Petroleum Company was dated December 7, 1945. The acreage covered by that contract was approximately 25,000 acres of land in Sherman and Hansford Counties, Texas.

b. The acreage covered by the contract between Phillips Petroleum Company and Stanolind Oil and Gas Company was approximately 118,000 acres in Sherman and Hansford Counties, Texas, and Texas County, Oklahoma.

c. The contract between Phillips Petroleum Company and United Producing Company, Inc., was dated November 8, 1945. The acreage covered by that contract was approximately 12,280 acres in Sherman County, Texas.

d. Article I of the Magnolia contract is as follows:

"Sale and Purchase of Gas

"Section 1. Subject to and in accordance with the terms of this contract Seller agrees to sell and deliver to Buyer and Buyer agrees to purchase and pay for all natural gas produced from the acreage covered hereby, up to Seller's ratable portion of Buyer's requirements for supplying

Michigan-Wisconsin Pipe Line Company under the pipe line contract, provided, however, that until Buyer shall commence deliveries of gas under the pipe line contract, Seller shall have the right to use or sell to others than Buyer any gas it may produce from said acreage and thereafter Seller may use or sell to others any surplus gas avail- [fol. 60] able from any well or wells over and above 250 per cent of the average daily volume of gas taken by Buyer from such well or wells during the preceding six calendar months, but any arrangement for any sale or disposition by Seller of such surplus gas available from any well or wells shall be subject to the prior right of Buyer to take from such well or wells at any time or from time to time upon 30 days written notice to Seller the total volume of gas that may legally be produced from such well or wells; and provided further that, in any event Seller shall have the right to use such volumes of gas produced from the acreage covered hereby as shall be required for the development and operation of said acreage for oil and gas purposes and to supply to Seller's lessors such volumes of gas as may be reserved to and taken by such lessors for domestic purposes.

"Section 2. Buyer agrees that with respect to and within the limits of each market to which Buyer shall deliver gas purchased hereunder, Buyer will take and purchase hereunder natural gas ratably from the acreage covered hereby in the same proportion that it takes natural gas from all other wells in the same field for such market. It is recognized and agreed that in taking natural gas ratably Buyer will be unable, due to varying operating conditions, to withdraw natural gas in exact ratable proportions during any specific month, but Buyer agrees that, to the best of its ability, by balancing excesses against deficiencies during a period of reasonable duration, it will maintain a ratable proportion of withdrawals for each market from the acreage covered hereby as compared with withdrawals from all other wells in the same field from which it takes gas for such market.

"Section 3. Buyer agrees that to the extent that the volume of gas which can be lawfully produced from wells that are at the time drilled on the dedicated acreage, (after deduction of volumes lost by shrinkage in the treatment by Buyer of said gas to bring it within the specifications

of the gas to be delivered to the pipe line company and the extraction of gasoline and other products therefrom as may be permitted by the pipe line contract and volumes used for development and operation of the dedicated acreage and [fol. 61] the operation of Buyer's facilities through which the gas is delivered to Michigan-Wisconsin Pipe Line Company) shall be sufficient to supply all of Michigan-Wisconsin Pipe Line Company's requirements for gas under the pipe line contract, Buyer will supply such requirements of gas to the pipe line company from dedicated acreage."

e. Article I of the Stanolind contract is as follows:

"Sale and Purchase of Gas

"Section 1. Subject to and in accordance with the terms of this contract, Seller agrees to sell and deliver to Buyer and Buyer agrees to purchase and pay for all natural gas produced from the acreage covered hereby except such volumes of gas as shall be required by Seller for the development and operation of said acreage for oil and gas purposes, such volumes of gas as may be reserved to and taken by lessors for domestic purposes, and any surplus gas available from any well or wells over and above 250 per cent of the average daily volume of gas taken by Buyer from such well or wells during the preceding six (6) calendar months, which surplus gas may be sold to any other person; provided that any arrangement for any sale or disposition by Seller of such surplus gas from any well or wells shall be subject to the prior right of Buyer, upon thirty (30) days' written notice to take and purchase hereunder from such well or wells at any time or from time to time the total volume of gas that may legally be produced from such well or wells.

"Section 2. Buyer agrees that with respect to and within the limits of each market to which Buyer shall deliver gas purchased hereunder, Buyer will take and purchase hereunder natural gas ratably from the acreage covered hereby in the same proportion that it takes natural gas from all other wells in the same field for such market. It is recognized and agreed that in taking natural gas ratably Buyer will be unable, due to varying operating conditions, to withdraw natural gas in exact ratable proportions during any specific month, but Buyer agrees that, to the best of

its ability, by balancing excesses against deficiencies during a period of reasonable duration, it will maintain a [fol. 62] ratable proportion of withdrawals for each market from the acreage covered hereby as compared with withdrawals from all other wells in the same field from which it takes gas for such market.

"Section 3. Buyer agrees that to the extent that the volumes of gas which can be lawfully produced from wells that are at the time drilled on the dedicated acreage, (after deduction of volumes lost by shrinkage in the treatment by Buyer of said gas to bring it within the specifications of the gas to be delivered to the pipe line company and the extraction of gasoline and other products therefrom as may be permitted by the pipe line contract and volumes used for development and operation of the dedicated acreage and the operation of Buyer's facilities through which the gas is delivered to Michigan-Wisconsin Pipe Line Company) shall be sufficient to supply all of Michigan-Wisconsin Pipe Line Company's requirements for gas under the pipe line contract, Buyer will supply such requirements of gas to the pipe line company from dedicated acreage."

f. Article I of the United Producing Company contract is substantially the same as Article I of the Stanolind contract.

IN UNITED STATES DISTRICT COURT

SUMMONS AND RETURN

To Each of the Above Named Defendants:

You are each hereby summoned and required to serve upon Harry D. Turner, attorney for the plaintiff Phillips Petroleum Company, whose address is 1211 First National Bank Building, Oklahoma City, Oklahoma, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Noble C. Hood, Clerk of Court, by Benjamin B. Ballenger, Deputy. (Seal.)

Dated July 15, 1947.

[fol. 63] (This summons is issued pursuant to Rule 4 of the Federal Rules of *Civil* Procedure)

U. S. Marshal's Office—Western District of Oklahoma. Received July 16, 1947. Docket No. 13869, Book 31, Page 55.

United States Marshal's Return

I received the within Writ at Oklahoma City, Oklahoma, on July 18, 1947 and on July 16, 1947, at Oklahoma City, Oklahoma, executed the same by leaving a true copy of the within Summons, together with copy of Complaint, for Magnolia Petroleum Company, a corporation, with W. R. Wallace, Service Agent; by leaving a true copy of the within Summons, together with copy of *Complaint*, for Skelly Oil Company, a corporation, with George M. Green, Service Agent; and by leaving a true copy of the within Summons, together with copy of Complaint, for Standard Oil and Gas Company, a corporation, with George M. Green, Service Agent.

Dave E. Hilles, U. S. Marshal, Western District of Oklahoma, by Roy A. Hopper, Deputy.

Filed July 18, 1947.

In United States District Court

Consolidated Motions of Skelly Oil Company—Filed September 3, 1947

(I) To Dismiss for Improper Venue,

(II) To Drop Skelly Oil Company as a Party Defendant, or, in the Alternative, for Severance,

(III) To Drop Michigan-Wisconsin Pipe Line Company as a Plaintiff,

(IV) To dismiss the Action Brought by Michigan-Wisconsin Pipe Line Company for Failure to State a Claim Upon Which Relief Can Be Granted,

(V) To Dismiss for Lack of Jurisdiction Over the Subject Matter,

(VI) To Dismiss or Abate Because of the Pendency of [fol. 64] Another Action in Another Court, Previously

Filed, or, in the Alternative, to Stay This Action Until Such Other Action Has Been Disposed Of,

(VII) For an Enlargement of Time.

The defendant Skelly Oil Company moves:

I

Motion to Dismiss for Improper Venue

For an order, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing this action as to Skelly Oil Company because of improper venue, on the grounds that:

1. All as affirmatively appears from the plaintiffs' complaint on file herein, the action against this defendant is founded upon the alleged existence of a claim or cause of action arising under the Laws of the United States;

2. As affirmatively appears from the complaint on file herein, no diversity of citizenship exists as between the plaintiffs and this defendant and jurisdiction is not claimed on account of diversity of citizenship;

3. Skelly Oil Company is not an inhabitant of the Northern District of Oklahoma within the meaning of Section 51, Judicial Code, as amended (Title 28, Section 112, U.S.C.A.), but is a corporation organized and existing under the laws of the State of Delaware, with a license to transact business within the State of Oklahoma and a designated service agent who is a citizen and resident of Oklahoma City, Oklahoma County, Oklahoma;

4. As appears from the complaint on file herein, neither of the plaintiffs is an inhabitant or a resident of the Northern District of Oklahoma or of the State of Oklahoma, each of said plaintiffs being a foreign corporation within the contemplation of Title 18, Section 452, Oklahoma Statutes Annotated;

5. The claim asserted by plaintiffs in their complaint on file herein did not arise in Tulsa County, Oklahoma, or in any other county within the Northern District of Oklahoma, [fol. 65] within the meaning of Section 452, Title 18, Oklahoma Statutes Annotated, and Skelly Oil Company has not

given *it's* consent to be sued in the Northern District of Oklahoma;

6. None of the exceptions to the venue rules as laid down in Section 51, Judicial Code (Title 28, Section 112, U.S.C.A.) exists in this action against this defendant.

II

Motion to Drop Skelly Oil Company as a Party Defendant, or, in the Alternative, for Severance

For an order, pursuant to Rules 20(a), 21 and 42(b) of the Federal Rules of Civil Procedure, that Skelly Oil Company be dropped as a party defendant herein, or, in the alternative, for an order that the claim asserted by the plaintiffs against this defendant be severed from the claims asserted by the plaintiffs against the defendants Stanolind Oil and Gas Company and Magnolia Petroleum Company, and providing for a separate proceeding with respect to such severed claim, on the grounds that:

1. As affirmatively appears from the plaintiffs' complaint on file herein, the claim asserted by plaintiffs against Stanolind Oil and Gas Company and Magnolia Petroleum Company arise out of written contracts to which this defendant was not a party signatory and in which this defendant has no interest; and

2. As affirmatively appears from the plaintiffs' complaint on file herein, the claim asserted by plaintiffs against this defendant arises out of a written contract between the plaintiff Phillips Petroleum Company and this defendant to which neither of the other parties defendant herein is a party signatory nor in interest.

III

Motion to Drop Michigan-Wisconsin Pipe Line Company as a Plaintiff Herein

For an order, pursuant to Rule 21 of the Federal Rules of Civil Procedure, dropping the Michigan-Wisconsin Pipe Line Company as a party plaintiff herein, on the ground [fol. 66] that, all as affirmatively appears from the plaintiffs' complaint on file herein, the contracts forming the basis of this action were entered into by and made for the

sole benefit of the parties signatory thereto, as a reading of said contracts will amply demonstrate.

IV

Motion to Dismiss the Action in so far as Michigan-Wisconsin Pipe Line Company Is Concerned for Failure of Said Plaintiff to State a Claim Against This Defendant upon Which Relief Can Be Granted

For an order, pursuant to Rule 12(b) (c) and (d) of the Federal Rules of Civil Procedure, dismissing the action in so far as Michigan-Wisconsin Pipe Line Company is concerned because the complaint fails to state a claim in favor of Michigan-Wisconsin Pipe Line Company and against this defendant upon which relief can be granted, on the ground that the material and pertinent allegations of the complaint on file herein fail to state a legal, equitable or otherwise justiciable claim or controversy on behalf of Michigan-Wisconsin Pipe Line Company which could under any theory, and assuming adequate proof, entitle it to any relief as against this defendant.

V

Motion to Dismiss for Lack of Jurisdiction over the Subject Matter

For judgment, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing this action for lack of jurisdiction of this Court over the subject matter, on the grounds that:

1. No diversity of citizenship exists and jurisdiction is not claimed on account of diversity of citizenship;

2. As affirmatively appears on the face of the complaint on file herein, this action does not arise under the Constitution or any of the laws of the United States, but in fact arises, if at all, under and by reason of the terms of contracts in writing between the plaintiff Phillips Petroleum Company and the defendants.

[fol. 67] VI

Motion to Dismiss or Abate Because of the Pendency of Another Action in Another Court, Previously Filed, or, in the Alternative, to Stay This Action Until Such Other Action Has Been Disposed of

For an order dismissing or abating this action in its entirety, or, in the alternative, dismissing or abating this action as against this defendant, or, in the alternative, for an order staying this entire action on the ground that there are other actions pending in another court, previously filed, and involving, in effect, the identical controversy herein involved and substantially the same parties, all as more particularly shown by transcripts of the records in said actions (less the exhibits to the petitions in said suits, which said exhibits were and are, in the case of the action by Skelly Oil Company, a copy of the contract between the plaintiff Phillips Petroleum Company and Skelly Oil Company, and, in the case of the action by Stanolind Oil and Gas Company, a copy of the contract between the plaintiff Phillips Petroleum Company and Stanolind Oil and Gas Company, a copy of each of which said contracts is attached to plaintiffs' complaint on file herein as a part of their "Exhibit I," which said copies are here now referred to and by such reference made a part of this defendant's Exhibits A and B, respectively) properly certified and hereto attached as Exhibits A and B, respectively, both of which said exhibits are made a part hereof by reference.

VII

Motion for Enlargement of Time

If this action be not dismissed in *it's* entirety or as to this defendant,

For an order extending the time of this defendant to answer the complaint herein until sixty (60) days after entry of all orders disposing of the motions hereinabove set forth.

[fol. 68] VIII

For an order granting this defendant such other and further relief as to the Court may seem just.

W. P. Z. German, John F. Jones, W. P. Z. German, Jr., Attorneys for the defendant Skelly Oil Company. Hawley C. Kerr of Counsel.

[Certificate of Service attached to original.]

Filed September 3, 1947.

STIPULATION RE EXHIBITS

The parties plaintiff and defendant agree that the clerk of the court in making the transcript of the record on appeal may omit all of Exhibits A and B attached to defendant Skelly Oil Company's Consolidated Motions filed in the above entitled action on September 3, 1947 (which exhibits are certified transcripts of the record and proceedings in the United States District Court for the Western District of Texas in Civil Action No. 377, entitled Skelly Oil Company vs. Phillips Petroleum Company, and Civil Action No. 376, entitled Stanolind Oil and Gas Company vs. Phillips Petroleum Company, each of which transcripts was certified by the clerk of said court under date of August 30, 1947), except the following:

(Here follows a description of the portions of said exhibits A and B which were included in the transcript of the record on appeal. Said portions are in this printed record immediately following this stipulation.)

It is agreed that other portions of each of said exhibits include, among other papers and instruments, the respective motions of the plaintiffs in said suits to remand said respective suits back to the state court and the answers of Phillips Petroleum Company to said motions, and it is further agreed that said actions were at the date of the

certification of said transcripts pending on said motions to remand.

[fol. 69] Dated this July 31, 1948.

Phillips Petroleum Company, Plaintiff, by Harry D. Turner, One of Its Attorneys; Skelly Oil Company, Defendant, by W. P. Z. German, One of Its Attorneys; Stanolind Oil and Gas Company, Defendant, by Ray S. Fellows, One of Its Attorneys; Magnolia Petroleum Company, Defendant, by Dan Moody, Its Attorney.

Filed August 6, 1948.

EXHIBIT A TO CONSOLIDATED MOTIONS OF SKELLY OIL COMPANY

IN THE 126TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

No. 77,848

SKELLY OIL COMPANY

vs.

PHILLIPS PETROLEUM COMPANY

PLAINTIFF'S ORIGINAL PETITION

To the Honorable Judge of Said Court:

Comes now Skelly Oil Company, hereinafter called plaintiff and complaining of Phillips Petroleum Company, hereinafter called defendant, and respectfully shows to the court the following:

I

That both plaintiff and defendant are corporations duly organized and existing under and by virtue of the laws of the State of Delaware and by their respective certificates of incorporation they are authorized to engage in the oil and gas business, and each of them is duly qualified as a foreign corporation under and pursuant to the laws of the State of Texas to do business in said State, including the transaction of the oil and gas business therein.

II

The plaintiff is actively engaged in the oil and gas business in the State of Texas on a large scale and owns, holds and operates substantial oil and gas properties therein. The defendant is likewise so engaged in said business in said state and owns, holds and operates substantial proper-
[fol. 70] ties therein. Among the properties of the plaintiff are oil and gas leases covering approximately 46,548 acres of land located in Sherman and Hansford Counties in said State that are hereinafter referred to, and among the properties of the defendant are like leases on thousands of acres of other lands in said counties.

III

The defendant has an agency and representative and maintains an office at Austin in Travis County, Texas, and has designated T. L. Dyer as the manager or person in charge of its Texas business or agency and also designated him as the agent for the service of process on the defendant, and service of process in this suit may be had on the said T. L. Dyer. Said T. L. Dyer resides in the City of Austin, Texas, and maintains an office for the conduct of defendant's business in the Brown Building in said city, where he and other agents and representatives employed by the defendant and also residing in said county carry on extensive activities in the conduct of the defendant's oil and gas business in said State. The matter in controversy in this suit, as hereinafter alleged, has a value in excess of $1,000.00, exclusive of interest.

IV

On December 5, 1945, the plaintiff and defendant entered into a contract in writing in which, subject to the other terms and conditions therein set forth, the plaintiff agreed to sell to the defendant and the defendant agreed to purchase from the plaintiff the nautral gas to be produced by plaintiff at the respective wellheads of plaintiff's gas wells to be drilled on the approximately 46,548 acres of land in Sherman and Hansford Counties, Texas, on which plaintiff owns and holds oil and gas leases or gas leases. A true and correct copy of said contract, not including the map which is made a part thereof, is attached hereto, marked Exhibit "A," and made by reference a part hereof for all purposes. Said map is not deemed to have any material bear-

ing on the issues herein involved; it identifies the said lands covered by said leases. Said contract contained, among others, the following introductory recitations:

"Michigan-Wisconsin Pipe Line Company, a Delaware [fol. 71] corporation with an office at Detroit, Michigan, desires to obtain from the Federal Power Commission a certificate of public convenience and necessity under the requirements of the Natural Gas Act for a pipe line system which it proposes to construct and operate extending from a point of delivery in Hansford County, Texas, in a northeasterly direction to points of connection with distribution systems in Michigan and Wisconsin, or either of them, and at intermediate points, and in order to obtain said certificate it is necesary that it have made available to it, adequate reserves of natural gas.

"Buyer represents to Seller that Buyer is now in the process of negotiating a contract with said Michigan-Wisconsin Pipe Line Company pursuant to which Buyer herein will be obligated to make available to said pipe line company the aforesaid required reserves of natural gas, by dedicating to said pipe line company the reserves of natural gas accumulated, at depths above sea level, in and under leases belonging to Buyer and in and under leases belonging to others with whom Buyer may enter into contracts for the purchase of natural gas, which leases are situated in *Dallam*, Sherman and Hansford Counties, Texas, and in Texas County, Oklahoma, and which comprise a part of the so-called Hugoton Gas Field (which gas field covers approximately 2,500,000 acres of land in Kansas, Oklahoma and Texas). In and by the said contract between Buyer herein and said pipe line company, said pipe line company will agree to purchase its requirements of gas up to 343 million cubic feet per day (at 14.737 pounds and 60° F.) from Buyer in said area.

"It is proposed that the said contract, hereinafter referred to as the 'pipe line contract,' in which Phillips Petroleum Company is designated as 'Seller' and Michigan-Wisconsin Pipe Line Company is designated as 'Buyer,' will contain, among others, the following provisions:

"• • • Upon the happening of any one of the following contingencies, to wit:

(a) The failure of Buyer to procure from the Federal Power Commission, on or before September 1, 1946, a Cer-

[fol. 72] tificate of Public Convenience and Necessity for the construction and operation of the Pipe Line, or

(b) The issuance by the Federal Power Commission of an order refusing to grant a Certificate of Public Convenience and Necessity for the Pipe Line, or

(c) The failure of Buyer to commence the actual construction of the Pipe Line on or before March 1, 1947, or

(d) The failure of Buyer to commence on or before January 1, 1948, the acceptance of deliveries of gas hereunder for delivery by Buyer for resale in one or more municipalities east of the Missouri River,

Seller shall have the right to terminate this contract by written notice to be delivered to Buyer not later than thirty (30) days after the happening of such contingency.' "

V

The sale and purchase provisions of said contract are contained in Section 1 of Article I thereof, and they obligated the plaintiff to sell and deliver to the defendant and the defendant to purchase and pay for (at prices per thousand cubic feet specified in Article VII of said contract) all the natural gas produced by plaintiff from said lands under plaintiff's leases thereon from depths above sea level up to plaintiff's ratable portion of defendant's requirements for supplying Michigan-Wisconsin Pipe Line Company, hereinafter sometimes called "Michigan-Wisconsin," under the proposed contract between defendant and Michigan-Wisconsin, with limited specified rights in the plaintiff to use and to sell some of such gas to others.

Section 1 of Article II of said contract provided that unless it should be sooner terminated as provided in Section 2 of said Article, said contract should remain in force and effect from its date and thereafter as long as the leases of plaintiff on the acreage covered thereby remained in force and effect and gas should be produced from said leases from depths above sea level, or until the amount of the gas available to Michigan-Wisconsin should be so reduced that the further operation of its (Michigan-Wisconsin's) [fol. 73] pipe line should no longer be profitable and such operations should be discontinued.

Section 2 of said Article II contains the terms and provisions of said contract which relate to the respective rights of the parties thereto to terminate the same. It reads as follows:

"Section 2. If the proposed contract between Buyer and Michigan-Wisconsin Pipe Line Company is not consummated on or before the first day of January, 1946, or if said contract is consummated and thereafter terminated upon the happening of one of the four contingencies hereinbefore quoted from said proposed contract, then and in either of those events either party shall have the right to terminate this contract by written notice to be delivered to the other party within thirty (30) days after the said first day of January, 1946, in case the said pipe line contract is not consummated, or within thirty (30) days after the termination of the pipe line contract as aforesaid; provided, however, that, in the event this contract shall not be terminated for any of the foregoing reasons on or before October 1, 1946, and in the event Michigan-Wisconsin Pipe Line Company shall fail to secure from the Federal Power Commission on or before that date a certificate of public convenience and necessity for the construction and operation of its pipe line, Seller shall have the right to terminate this contract by written notice to Buyer delivered to Buyer at any time after December 1, 1946, but before the issuance of such certificate. Immediately upon the occurrence of any of the events or contingencies hereinbefore mentioned in this Section 2 or in the event of the termination by Buyer herein of its contract with Michigan-Wisconsin Pipe Line Company, Buyer herein shall give Seller herein notice thereof by telegram, to be confirmed by letter."

VI

The commencement of performance of the contract between plaintiff and defendant was made dependent upon the commencement of the construction of Michigan-Wisconsin's proposed interstate gas pipe line, and in Section 3 of Article V of said contract it was provided in part that:

"Buyer (defendant herein) agrees that it will give Seller [fol. 74] (plaintiff herein) prompt notice in writing of the commencement by Michigan-Wisconsin Pipe Line Company of the actual construction of the line for which provision is made in the pipe line contract . . ."

On the receipt of such notice, if and when given while said contract remained in force, plaintiff was obligated by the further provisions of said Section 3 to proceed with the development of its leases so that by the time such pipe line should be completed and ready to be placed in operation plaintiff could commence the delivery to defendant of gas from its properties covered by said contract and defendant could in turn sell and deliver same to Michigan-Wisconsin as a part of the gas that defendant was to supply to Michigan-Wisconsin. The proposed contract between defendant and Michigan-Wisconsin was executed prior to January 1, 1946, and it contained the termination provisions quoted from their proposed contract in the preamble to the contract between plaintiff and defendant; but the construction of said pipe line has never been commenced. The plain purpose of the above copied termination provisions (Section 2 of Article II) of said contract between plaintiff and defendant was that it could be terminated if Michigan-Wisconsin should fail promptly (by certain dates specified therein) to secure the issuance to it of such certificate because such failure would necessarily result in undue delay in the performance of the other provisions thereof relating to the development of plaintiff's leases and the sale and delivery of the production of natural gas therefrom, and thus time in respect of said matter was of the essence. Although Michigan-Wisconsin failed to procure such certificate on or before September 1, 1946 (same being the first contingency on that subject stated in said termination provisions), the defendant did not for that reason exercise its right to terminate its contract with Michigan-Wisconsin and therefore the first eventuality on the occurrence of which plaintiff would have had the right to terminate its contract with defendant did not occur. Furthermore said certificate was not secured by Michigan-Wisconsin on or before October 1, 1946, another possible eventuality recited in said Section 2, nor was such certificate secured or issued on or before December 1, 1946. Therefore plaintiff's right of [fol.75] termination of said contract arose on December 2, 1946, provided only that plaintiff should on that day or subsequently deliver to defendant its written notice of its termination thereof before the issuance of such certificate. Plaintiff alleges that the plain intent and meaning of said provision was that if a final, valid and effective certificate pursuant to which Michigan-Wisconsin could proceed im-

mediately with the construction and operation of said pipe line, to the end that there would be no further delay in the performance of said contract, was not issued by December 1, 1946, plaintiff had the right to terminate and cancel said contract provided only that plaintiff do so before the issuance of such a final, valid and effective certificate after December 1, 1946.

Plaintiff further alleges that on December 1, 1946, the defendant dispatched to the plaintiff a telegram reading as follows:

"Federal Power Commission issued certificate to Michigan-Wisconsin Pipe Line Company Saturday, November 30. We are awaiting written order and will supply you copy upon receipt."

which telegram was received by plaintiff early on the morning of December 2, 1946. Although said telegram advised plaintiff that defendant would supply plaintiff with a copy of the order therein referred to, defendant has never yet done so. After the receipt of said telegram plaintiff ascertained that defendant was in error, that the fact was that no certificate had been issued to Michigan-Wisconsin on November 30, 1946, and in fact had not as yet been issued, and thereupon plaintiff dispatched to the defendant its telegraphic notice, charges prepaid, terminating said contract, reading as follows:

"Received today your telegram dated yesterday advising that certificate was issued to Michigan-Wisconsin Pipeline Company on November thirtieth. We are informed at 4 o'clock Central Standard Time today that said certificate has not yet been issued therefore we hereby exercise our right under section two of Article two of the written contract of December 5, 1945, between your company and Skelly Oil Company to terminate and we do hereby terminate said contract." Said telegram was received by defendant on [fol. 76] December 2, 1946. Plaintiff alleges that no such certificate as was required or contemplated, as hereinabove alleged, by the termination provisions of said contract had been issued to Michigan-Wisconsin at or prior to the time said termination telegram was delivered to the defendant; that in fact no certificate whatever had been issued to Michigan-Wisconsin at or prior to said time. Plaintiff therefore

alleges that the giving of said notice terminated said contract.

But, defendant, asserting that such certificate had been secured by said company prior to December 2, 1946, did on December 3, 1946, dispatch to the plaintiff a telegram reading as follows:

"Prior to December 2, 1946, Michigan Wisconsin Pipe Line Company secured from the Federal Power Commission a certificate of public convenience and necessity for the construction and operation of its pipe line, thereby precluding your right to terminate under section 2 of Article II of the contract of December 5, 1945, between Phillips Petroleum Company as Buyer and Skelly Oil Company as Seller covering the sale and delivery of natural gas. Your telegram of December 2, 1946, addressed to E. E. Rice Phillips Petroleum Company purporting to terminate said contract does not operate to terminate or cancel said contract. Said contract remains in full force and effect and Phillips Petroleum Company will hold you to strict accountability for your failure to comply with the terms and provisions thereof."

Thus, the defendant contends that a certificate had been secured prior to December 2, 1946, and that the giving by plaintiff of its said termination notice to the defendant was ineffective to terminate said contract and that said contract remained and remains in full force and effect.

VII

That a dispute thus arose and still exists between the plaintiff and the defendant as to whether the right of plaintiff to terminate said contract existed at the time when on December 2, 1946, the plaintiff's aforesaid termination telegram was delivered to the defendant. That this dispute involves the question as to whether, at or prior to the time said termination notice was delivered to the defendant, there had been issued to Michigan-Wisconsin a final, valid [fol. 77] and effective certificate authorizing the construction and operation of its proposed pipe line under and by virtue of which Michigan-Wisconsin was given the right to proceed promptly with the construction of said pipe line to be followed promptly by the operation thereof, and whether any certificate of public convenience and necessity whatsoever had been issued to said company at or prior to said time. The plaintiff contends that no such certifi-

cate had been issued at or prior to said time. The defendant claims the contrary.

VIII

That in view of the long term of said contract as defined in said Section 1 of Article II thereof, in the absence of the termination or cancellation thereof under the said termination provisions of Section 2 of said Article II thereof, and the large amount of gas properties involved therein and the right, duties, obligations and liabilities of the respective parties under the various provisions of said contract if not so terminated, it is highly important from the standpoint of each party thereto that the dispute or controversy aforesaid, as to the true construction of said contract and whether it has been terminated, be expeditiously settled by the declaration and judgment of a court of competent jurisdiction, and hence this suit for a declaratory judgment is filed.

Plaintiff prays that citation issue as required by law and that upon return of same and hearing of this cause a declaratory judgment be entered declaring and fixing the rights, status, legal relations and legal obligations of the plaintiff and the defendant respect*fully* under the termination provisions of the said contract of December 5, 1945, and that under the terms of said contract and under the facts existing when the plaintiff's notice of termination or cancellation was given the right to terminate or cancel the said contract existed; and that said contract was terminated on December 2, 1946, and that the plaintiff is no longer obligated by any of the terms or provisions of said contract; and for such other and further relief as to the Court may seem just under the facts and the law.

W. P. Z. Germian, W. P. Z. German, Jr.

Of Counsel: John F. Jones.

[fol. 78] Filed in the 126 District Court of Travis County, Texas, at 8:43 A. M., May 21, 1947. Ben Lee Chote, District Clerk, by Mrs. Eloise Wear, Deputy.

CITATION

The State of Texas.

To Phillips Petroleum Company, a corporation, of which T. L. Dyer is manager in charge of its Texas business and upon whom service may be had (Brown Building, Austin,

Travis County, Texas, Defendant, in the hereinafter style and numbered cause:

You are hereby commanded to appear before the 126th Judicial District Court of Travis County, Texas, to be held at the courthouse of said County in the City of Austin, Travis County, Texas, at 10 o'clock A. M. on the Monday next after the expiration of 20 days from the date of service hereof and answer the petition of plaintiff, a copy of which accompanies this citation, in cause number 71,848, styled Skelly Oil Company, Plaintiff, vs. Phillips Petroleum Company, Defendant, filed in said court on the 21st day of May, 1947.

If this citation is not served within 90 days after date of its issuance, it shall be returned unserved.

Witness, Ben Lee Chote, Clerk of the District Courts of Travis County, Texas.

Issued and given under my hand and seal of said Court at office in the City of Austin, this the 21st day of May, 1947.

Ben Lee Chote, Clerk of the District Courts of Travis County, Texas, by Mrs. Eloise Wear, Deputy.
(Seal.)

Officer's Return

Came to hand on the 21st day of May, 1947, at 11:00 o'clock A. M.

Executed at Austin, within the County of Travis, at 11:15 o'clock A. M. on the 21st day of May, 1947, by delivering to the within named Phillips Petroleum Company, by delivering to T. L. Dyer, Agent, each, in person, a true copy of this [fol. 79] citation together with the accompanying copy of the petition, having first attached such copy of such petition to such copy of citation and indorsed on such copy of citation the date of delivery.

The distance actually traveled by me in serving such process was ... miles, and my fees are as follows:

For serving this citation	$1.25
For mileage	xxx
Total fees	$1.25

To certify which witness my hand officially.

H. W. Collins, Sheriff of Travis County, Texas, by W. W. Smith, Deputy.

Filed in the 126 District Court of Travis County, Texas, at 4:55 P. M., May 21, 1947. Ben Lee Chote, District Clerk, by Mrs. Eloise Wear, Deputy.

In the 126th District Court of Travis County, Texas. No. 77848: Skelly Oil Company, Plaintiff, vs. Phillips Petroleum Company, Defendant.

PETITION FOR REMOVAL TO UNITED STATES DISTRICT COURT

To the Honorable Judge of the 126th District Court of Travis County, Texas:

Comes now the defendant Phillips Petroleum Company and respectfully shows the court that:

1. The above entitled action now pending in this court is a suit of a civil nature arising under the Constitution or laws of the United States of America of which the District Courts of the United States are given original jurisdiction and may be removed by this defendant to the District Court of the United States for the Western District of Texas.

2. Plaintiff's original petition filed herein discloses on its face that this suit is one arising under the laws of the United States, in that its correct decision depends upon the interpretation and construction of the Natural Gas Act (52 [fol. 80] Stat. 821, et seq., 15 U. S. C. A. 717, et seq.) and the rules of procedure, rules, regulations and orders of the Federal Power Commission promulgated pursuant to the specific provisions of said Natural Gas Act. The basic controversy presented by plaintiff's petition is whether the said Federal Power Commission granted to Michigan-Wisconsin Pipe Line Company "a certificate of public convenience and necessity under the requirements of the natural Gas Act for a pipe line system which it proposes to construct and operate extending from a point of delivery in Hansford County, Texas, in a northeasterly direction to points of connection with distribution systems in Michigan and Wisconsin, or either of them," prior to the delivery to this defendant on December 2, 1946, of a telegram notifying defendant of plaintiff's intent to cancel the gas purchase contract between the parties. Whether or not the action taken by the Federal Power Commission in the hearing

before it in the matter of Michigan-Wisconsin Pipe Line Company amounted to the issuance of such a certificate of public convenience and necessity under the requirements of the Natural Gas Act prior to December 2, 1946, must necessarily depend upon what the requirements of the Natural Gas Act are, both with regard to what is necessary to constitute a certificate of public convenience and necessity and also the time and manner which orders granting such certificates become effective under that Act and the orders or rules of the Commission.

3. The amount in controversy in this suit at the time of the commencement of this action and at the present time substantially exceeds the sum or value of Three Thousand Dollars ($3,000.00), exclusive of interests and costs.

4. The time in which your petitioner as defendant in the above styled case is required by the laws of Texas to appear, answer or plead to the petition of the plaintiff has not expired.

5. This defendant has a good and sufficient defense to the plaintiff's complaint.

6. The proper court to which this cause should be removed is the United States District Court for the Western District of Texas, at Austin.

[fol. 81] 7. There is presented herewith a bond, with good and sufficient surety, in compliance with the law in such cases.

Wherefore, defendant, your petitioner, prays the court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and cause the record herein to be removed to said District Court of the United States for the Western District of Texas at Austin.

Don Emery, R. L. Foster, R. B. F. Hummer, George L. Sneed, T. L. Dyer, Attorneys for Petitioner Defendant Phillips Petroleum Company.

[Verified.]

IN THE 126TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

No. 77848

SKELLY OIL COMPANY, Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY, Defendant

ORDER OF REMOVAL

The defendant, having at 4:10 P. M. June 16, 1947, filed his petition praying for the removal of this cause to the United States District Court for the Western District of Texas at Austin, and having at the same time filed its bond in the sum of Five Hundred ($500.00) Dollars with good and sufficient surety and conditioned according to law, it is on motion of T. L. Dyer, attorney for defendant,

Ordered, that said petition be and is hereby accepted, and said bond is approved, and it is further

Ordered, that the above entitled cause be removed to the United States District Court for the Western District of Texas at Austin, and that all further proceedings in this court be stayed.

Roy A. Ruhm, Judge of Said Court.

Date: June 16, 1947, at 4:10 P. M.

Filed in the 126 District Court of Travis County, Texas, [fol. 82] at 4:10 P. M., June 16, 1947. Ben Lee Chote, District Clerk, by Mrs. Helen Sellers, Deputy.

EXHIBIT B TO CONSOLIDATED MOTIONS OF SKELLY OIL COMPANY

IN THE 126TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

No. 77,844

STANOLIND OIL AND GAS COMPANY

vs.

PHILLIPS PETROLEUM COMPANY

PLAINTIFF'S ORIGINAL PETITION

To the Honorable Judge of Said Court:

Comes now Stanolind Oil and Gas Company, hereinafter called plaintiff, and complaining of the Phillips Petroleum

Company, hereinafter called defendant, and respectfully shows to the Court the following:

I

Plaintiff is a corporation duly incorporated under the laws of the State of Delaware and has obtained and for many years has held, and now holds, a permit as a foreign corporation authorizing it to engage in the oil and gas business in the State of Texas. It is now engaged in such business and is the owner of extensive oil and gas properties in the State of Texas, including the gas properties hereinafter mentioned.

II

Phillips Petroleum Company, the defendant, is a corporation duly incorporated under the laws of the State of Delaware and has received and now holds a permit as a foreign corporation authorizing it to engage in the oil and gas business in the State of Texas. It is now engaged in such business and is the owner of extensive oil and gas properties in the State of Texas, including a large amount of acreage in the Panhandle of Texas from which it is producing a large amount of gas.

III

Plaintiff further alleges that the permit under which the defendant is now engaged in business in the State of Texas was issued to it by the Secretary of State under date of May [fol. 83] 1, 1946, and that in the application for said permit the defendant set forth that its business in the State of Texas was to be transacted at Austin, Texas, and T. L. Dyer was designated as the "manager or person in charge" of said Texas business or agency, that said T. L. Dyer was also designated as the agent for the service of process, and service of process may be had on the said T. L. Dyer. Said T. L. Dyer resides in the City of Austin, Travis County, Texas, and maintains an office for the conduct of defendant's business in the Brown Building in the City of Austin where he and other agents and representatives employed by the defendant and residing in Travis County, Texas, carry on extensive activities in the conduct of the defendant's oil and gas business in the State of Texas.

IV

On the 5th day of December, 1945, the plaintiff and the defendant entered into a contract under which the plaintiff agreed to sell and the defendant agreed to buy a large amount of gas produced from approximately 118,000 acres of land located in Sherman and Hansford Counties, Texas, and Texas County, Oklahoma. A copy of said contract (excepting the map attached thereto, which may, if attached, would needlessly encumber this petition) designated as Exhibit "A" is attached to this petition and made a part of the same for all purposes. Said contract contained among other things the following provisions:

"Michigan-Wisconsin Pipe Line Company, a Delaware corporation, with an office at Detroit, Michigan, desires to obtain from the Federal Power Commission a certificate of public convenience and necessity under the requirements of the Natural Gas Act for a pipe line system which it proposes to construct and operate extending from a point of delivery in Hansford County, Texas, in a northeasterly direction to points of connection with distribution systems in Michigan and Wisconsin, or either of them, and at intermediate points, and in order to obtain said certificate it is necessary that it have made available to it, adequate reserves of natural gas.

"Buyer represents to Seller that Buyer is now in the process of negotiating a contract with said Michigan-Wisconsin Pipe Line Company pursuant to which Buyer herein will be [fol. 84] obligated to make available to said pipe line company the aforesaid required reserves of natural gas, by dedicating to said pipe line company the reserves of natural gas accumulated, at depths above sea level, in and under leases belonging to Buyer and in and under leases belonging to others with whom Buyer may enter into contracts for the purchase of natural gas, which leases are situated in *Dallam*, Sherman and Hansford Counties, Texas, and in Texas County, Oklahoma, and which comprise a part of the so-called Hugoton Gas Field (which gas field covers approximately 2,500,000 acres of land in Kansas, Oklahoma and Texas). In and by the said contract between Buyer herein and said pipe line company, said pipe line company will agree to purchase its requirements of gas up to 343 million cubic feet per day (at 14.735 pounds and 60° F.) from Buyer in said area.

"It is proposed that the said contract, hereinafter referred to as the 'pipe line contract,' in which Phillips Petroleum Company is designated as 'Seller' and Michigan-Wisconsin Pipe Line Company is designated as 'Buyer,' will contain, among others the following provisions:

"* * * Upon the happening of any one of the following contingencies, to wit:

(a) The failure of Buyer to procure from the Federal Power Commission, on or before September 1, 1946, a Certificate of Public Convenience and Necessity for the construction and operation of the Pipe Line, or

(b) The issuance by the Federal Power Commission of an order refusing to grant a Certificate of Public Convenience and Necessity for the Pipe Line, or

(c) The failure of Buyer to commence the actual construction of the Pipe Line on or before March 1, 1947, or

(d) The failure of Buyer to commence on or before January 1, 1948, the acceptance of deliveries of gas hereunder for delivery by Buyer for resale in one or more municipalities east of the Missouri River,

Seller shall have the right to terminate this contract by written notice to be delivered to Buyer not later than thirty (30) days after the happening of such contingency.'"

[fol. 85] V

Article I of said contract sets forth the rights and obligations of the parties in respect to the sale and purchase of gas under said contract.

Article II of said contract defines the term of the contract and reads as follows:

"Section 1. Unless sooner terminated as hereinafter provided in Section 2 of this Article II, this agreement shall remain in force and effect from the date hereof and thereafter as long as any of the oil and gas leases or gas leases on the acreage covered hereby remain in force and effect and gas shall be produced from such leases from depths above sea level.

"Section 2. If the proposed contract between Buyer and Michigan-Wisconsin Pipe Line Company is not consummated

on or before the first day of January, 1946, or if said contract is consummated and thereafter terminated upon the happening of one of the four contingencies hereinbefore quoted from said proposed contract, then and in either of those events either party shall have the right to terminate this contract by written notice to be delivered to the other party within thirty (30) days after the said first day of January, 1946, in case the said pipe line contract is not consummated, or within thirty (30) days after the termination of the pipe line contract as aforesaid; provided, however, that, in the event this contract shall not be terminated for any of the foregoing reasons on or before October 1, 1946, and in the event Michigan-Wisconsin Pipe Line Company shall fail to secure from the Federal Power Commission on or before that date a certificate of public convenience and necessity for the construction and operation of its pipe line, Seller shall have the right to terminate this contract by written notice to Buyer delivered to Buyer at any time after December 1, 1946, but before the issuance of such certificate. Immediately upon the occurrence of any of the events or contingencies hereinbefore mentioned in this Section 2 or in the event of the termination by Buyer herein of its contract with Michigan-Wisconsin Pipe Line Company, Buyer herein shall give Seller herein notice thereof by telegram, to be confirmed by letter."

[fol. 86] VI

That said Section 2 of Article II of said contract conferred on the plaintiff (the Seller in said contract) the right to terminate the contract by written notice to the defendant (the Buyer in said contract) delivered to the defendant at any time after December 1, 1946, but before the issuance of the certificate of public convenience and necessity therein referred to.

Plaintiff alleges that on the morning of December 2, 1946, no certificate of public convenience and necessity having been theretofore issued as contemplated by said contract, plaintiff gave written notice by telegram to defendant as follows:

"Phillips Petroleum Company, Bartlesville, Oklahoma:

"Please refer to that certain contract, dated December 5, 1945, between Phillips Petroleum Company, as 'Buyer,' and

Stanolind Oil and Gas Company, as 'Seller,' covering the sale and purchase of natural gas produced from certain leases owned by Stanolind Oil and Gas Company in Sherman and Hansford Counties, Texas, and Texas County, Oklahoma, with particular reference to Section 2 of Article II thereof.

"You are hereby notified that Stanolind Oil and Gas Company hereby terminates the aforesaid contract of December 5, 1945, between Phillips Petroleum Company, as 'Buyer,' and Stanolind Oil and Gas Company, as 'Seller,' for the reason that Michigan-Wisconsin Pipe Line Company failed to secure, on or before October 1, 1946, a certificate of public convenience and necessity for the construction and operation of its pipe line and has not since secured such certificate.

"Stanolind Oil and Gas Company, By E. F. Bullard, President."

which said telegram was delivered to defendant at or about the hour of 8:00 A. M., December 2, 1946, at Bartlesville, Oklahoma. That prior to the delivery of said telegram as aforesaid no certificate of public convenience and necessity as contemplated by said contract had been issued to Michigan-Wisconsin Pipe Line Company authorizing the construction and operation of its pipe line as mentioned and [fol. 87] described in said contract or authorizing the construction and operation of any pipe line by said Michigan-Wisconsin Pipe Line Company. Thereafter and on December 3, 1946, defendant sent to plaintiff at Tulsa, Oklahoma, the following telegram, to-wit:

"Stanolind Oil and Gas Co. Attn, E. F. Bullard President Stanolind Bldg. Tulsa.

"Prior to December 2, 1946, Michigan Wisconsin Pipe Line Company secured from the Federal Power Commission a certificate of public convenience and necessity for the construction and operation of its pipe line, thereby precluding your right to terminate under Section 2 of Article II of the contract of December 5, 1945, between Phillips Petroleum Company as Buyer and Stanolind Oil & Gas Company as Seller covering the sale and delivery of natural gas. Your telegram of December 2, 1946, addressed to Phillips Petroleum Company, purporting to terminate said contract does not operate to terminate or cancel said contract. Said contract remains in full force and effect and Phillips Petroleum

Company will hold you to strict accountability for your failure to comply with the terms and provisions thereof.

"Phillips Pet. Co., by K. S. Adams, President."

VII

That a dispute thus arose and still exists between the plaintiff and defendant as to whether the right of termination as provided by said contract of December 5, 1945, existed in plaintiff at the time said telegram, sent by plaintiff to defendant as aforesaid, was received by defendant as aforesaid. This dispute involves the question of whether, prior to the receipt of said telegram by defendant on December 2, 1946, there was issued by the Federal Power Commission to Michigan-Wisconsin Pipe Line Company a certificate of *public convenience and necessity for the construction* and operation by it of the pipe line described and referred to in Section 2 of Article II of said contract of December 5, 1945, as required by the terms and provisions and the true construction of said contract. Plaintiff contends that at the time said telegram was sent by it to defendant and at the [fol. 88] time said telegram was received by defendant, all as aforesaid, no certificate of public convenience and necessity for the construction and operation of said pipe line as required by said contract of December 5, 1945, had been issued to Michigan-Wisconsin Pipe Line Company within the true construction and meaning of said contract. The defendant claims to the contrary.

VIII

Section 1 of Article II of the contract between plaintiff and defendant defining its "Term" provides that unless sooner terminated in the manner provided in Section 2 of the same article the contract shall remain in force and effect from its date and thereafter as long as any of the oil and gas leases on the acreage covered by the contract remain in force and effect and gas shall be produced from such leases from depth above sea level. That in view of the term of the contract, unless terminated or canceled as thus defined, and the amount of gas producing properties involved in the contract and the rights and liabilities of the parties under the contract it is highly important from the standpoint of each party to the contract that the dispute or controversy as to its true construction be settled at the earliest time and in the

simplest and most direct way, hence this suit for a declaratory judgment is filed.

Plaintiff prays that citation issue as required by law and that upon return of same and hearing of this cause a declaratory judgment be entered that under the terms of said contract and under the facts existing when the notice of termination or cancellation was given that the right to thus terminate or cancel the contract existed; and that the plaintiff is no longer obligated by any of the terms or provisions of said contract; and that the judgment declare and fix the rights, status, legal relations and legal obligations of the plaintiff and the defendant, respectively, under the said contract of December 5, 1945; and for such other and further relief as to the Court may seem just under the facts and the law,

Dan Moody, Black & Stayton, Charles L. Black, Attorneys for Plaintiff.

[fol. 89] Of Counsel: Donald Campbell, L. A. Thompson.

Filed in the 126th District Court of Travis County, Texas, at 12:01 P. M., May 20, 1947. Ben Lee Chote, District Clerk, by Mrs. Helen Sellers, Deputy.

CITATION

The State of Texas.

To—T. L. Dyer, Brown Building, Austin, Texas, Manager or person in charge of said Texas business or agency of Phillips Petroleum Company, Defendant, in the hereinafter styled and numbered cause:

You are hereby commanded to appear before the 126th Judicial District Court of Travis County, Texas, to be held at the courthouse of said County in the City of Austin, Travis County, Texas, at 10 o'clock A. M. on the Monday next after the expiration of 20 days from the date of service hereof and answer the petition of plaintiff, a copy of which accompanies this citation, in cause number 77,844, styled Stanolind Oil and Gas Company, Plaintiff, vs. Phillips Petroleum Company, Defendant, filed in said court on the 20th day of May, 1947.

If this citation is not served within 90 days after date of its issuance, it shall be returned unserved.

Witness, Ben Lee Chote, Clerk of the District Courts of Travis County, Texas.

Issued and given under my hand and seal of said Court at office in the City of Austin, this the 20th day of May, 1947.

Ben Lee Chote, Clerk of the District Courts of Travis County, Texas, by Henry H. Rogers, Deputy.

Officer's Return

Came to hand on the 20th day of May, 1947, at 4:00 o'clock P. M.

[fol. 90] Executed at *Austi*, within the County of Travis, at 8:20 o'clock A. M. on the 21st day of May, 1947, by delivering to the within named T. L. Dyer, Agent for Phillips Petroleum Company, each in person, a true copy of this citation together with the accompanying copy of the petition, having first attached such copy of such petition to such copy of citation and indorsed on such copy of citation the date of delivery.

The distance actually traveled by me in serving such process was .... miles, and my fees are as follows:

For serving this citation	$1.25
For mileage	.20
For mileage	.20
Total fees	$1.45

To certify which witness my hand officially.

H. W. Collins, Sheriff of Travis County, Texas, by W. W. Smith, Deputy.

Filed in the 126 District Court of Travis County, Texas, at 4:55 P. M., May 21, 1947. Ben Lee Chote, District Clerk, by Mrs. Eloise Wear, Deputy.

In the 126th District Court of Travis County, Texas. No. 77844. Stanolind Oil and Gas Company, Plaintiff, vs. Phillips Petroleum Company, Defendant

PETITION FOR REMOVAL

To the Honorable Judge of the 126th District Court of Travis County, Texas:

Comes now the defendant Phillips Petroleum Company and respectfully shows the court that:

1. The above entitled action now pending in this court is a suit of a civil nature arising under the Constitution or laws of the United States of America of which the District Courts of the United States are given original jurisdiction and may be removed by this defendant to the District Court of the United States for the Western District of Texas.

[fol. 91] 2. Plaintiff's original petition filed herein discloses on its face that this suit is one arising under the laws of the United States, in that its correct decision depends upon the interpretation and construction of the Natural Gas Act (52 Stat. 821, et seq., 15 U. S. C. A. 717, et seq.) and the rules of procedure, rules, regulations and orders of the Federal Power Commission promulgated pursuant to the specific provisions of said Natural Gas Act. The basic controversy presented by plaintiff's petition is whether the said Federal Power Commission granted to Michigan-Wisconsin Pipe Line Company "a certificate of public convenience and necessity under the requirements of the Natural Gas Act for a pipe line system which it proposes to construct and operate extending from a point of delivery in Hansford County, Texas, in a northeasterly direction to points of connection with distribution systems in Michigan and Wisconsin, or either of them," prior to the delivery to this defendant on December 2, 1946, of a telegram notifying defendant of plaintiff's intent to cancel the gas purchase contract between the parties. Whether or not the action taken by the Federal Power Commission in the hearing before it in the matter of Michigan-Wisconsin Pipe Line Company amounted to the issuance of such a certificate of public convenience and necessity under the requirements of the Natural Gas Act prior to December 2, 1946, must necessarily depend upon what the requirements of the Natural Gas Act are, both with regard to what is necessary to constitute a certificate of public convenience and necessity and also the time and manner which orders granting such certificates become effective under that Act and the orders or rules of the Commission.

3. The amount in controversy in this suit at the time of the commencement of this action and at the present time substantially exceeds the sum or value of Three Thousand Dollars ($3,000.00), exclusive of interests and costs.

4. The time in which your petition as defendant in the above styled case is required by the laws of Texas to appear, answer or plead to the petition of the plaintiff has not expired.

5. This defendant has a good and sufficient defense to the plaintiff's complaint.

[fol. 92] 6. The proper court to which this cause should be removed is the United States District Court for the Western District of Texas, at Austin.

7. There is presented herewith a bond, with good and sufficient surety, in compliance with the law in such cases.

Wherefore, defendant, your petitioner, prays the court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and cause the record herein to be removed to said District Court of the United States for the Western District of Texas at Austin.

Don Emery, R. L. Foster, R. B. F. Hummer, George L. Sneed, T. L. Dyer, Attorneys for Petitioner Defendant, Phillips Petroleum Company.

[Verified.]

In the 126th District Court of Travis County, Texas. No. 77844. Stanolind Oil and Gas Company, Plaintiff, vs. Phillips Petroleum Company, Defendant

ORDER OF REMOVAL

The defendant, having at 4:10 P. M., June 16, 1947, filed his petition praying for the removal of this cause to the United States District Court for the Western District of Texas at Austin, and having at the same time filed his bond in the sum of Five Hundred ($500.00) Dollars with good and sufficient surety and conditioned according to law, it is on motion of T. L. Dyer, attorney for defendant,

Ordered, that said petition be and it hereby is accepted, and said bond is approved, and it is further

Ordered, that the above entitled cause be removed to the United States District Court for the Western District of Texas at Austin, and that all further proceedings in this court be stayed.

Roy C. Archer, Judge of Said Court.

[fol. 93] . Date June 16, 1947, at 4:10 P. M.

Filed in the 126 District Court of Travis County, Texas, at 4:10 P. M., June 16, 1947. Ben Lee Chote, District Clerk, by Mrs. Helen Sellers, Deputy.

In United States District Court

Consolidated Motions of Stanolind Oil and Gas Company—Filed September 2, 1947

I. Motion to dismiss and quash service of summons for improper venue and lack of jurisdiction over the person.

II. Motion to dismiss for lack of jurisdiction over the subject matter.

III. Motion to drop Michigan-Wisconsin Pipe Line Company, a corporation, as plaintiff herein.

IV. Motion to drop defendant Stanolind Oil and Gas Company as party, or, in the alternative, for severance of claims.

V. Motion to dismiss or abate because of the pendency of another action in the District Court of the United States for the Western District of Texas, previously filed and involving, in effect, the same controversy; or, in the alternative, to stay this action until such other action is disposed of.

Comes now the defendant Stanolind Oil and Gas Company, a corporation, whose post office address is Stanolind Building, Tulsa, Oklahoma, and proceeding under Rule 12,

and particularly under 12(g), makes and files the following consolidated motion:

I

Motion to Dismiss and Quash Service of Summons for Improper Venue and Lack of Jurisdiction over the Person

Said defendant moves the court to dismiss this action as against it and to quash service of summons made upon this defendant, because of improper venue and lack of jurisdiction over the person of this defendant in that said action is brought in the wrong district and service of sum-[fol. 94] mons was not authorized and did not confer jurisdiction over the person of this defendant, and in this connection said defendant shows:

(1) That the jurisdiction of this court is invoked solely on the ground that the action arises under the Constitution and laws of the United States;

(2) That this defendant is not an inhabitant of the State of Oklahoma within the meaning of Section 51 of the Judicial Code, as amended; that this defendant is a corporation organized and existing under the laws of the State of Delaware but is qualified to transact business within the State of Oklahoma as a foreign corporation, and pursuant to the provisions of Section 452 of Title 18, Oklahoma Statutes Annotated, has appointed an agent—a citizen of the State of Oklahoma, residing at Oklahoma City, the State *Capitol*—upon whom service of process may be made in any action in which defendant is a party and which action is brought in any county of the State of Oklahoma in which such cause of action arose as provided by the laws of the State of Oklahoma;

(3) That plaintiffs' action is brought under Section 274-D of the Judicial Code (28 U. S. C. A. Sec. 400), commonly known as the "Federal Declaratory Judgment Act"; that no action under said Act could be brought and maintained in any court of the State of Oklahoma, nor is there any law of the State of Oklahoma recognizing, authorizing, or providing for any action or proceeding for a declaratory judgment of any kind or character;

(4) That plaintiffs' alleged cause of action, if it arose at all, did not arise in any county of the State of Oklahoma

embraced within the Northern District of Oklahoma; that this defendant has not given its consent to be sued in the Northern District of Oklahoma—

(a) In any cause of action not arising therein,

(b) In any cause of action not arising under the laws of the State of Oklahoma,

(c) in any cause of action arising solely under the laws of the United States and not cognizable in the courts of the State of Oklahoma, and

[fol. 95] (d) in any cause of action which does not apply the laws of the State of Oklahoma.

II

Motion to Dismiss for Lack of Jurisdiction over the Subject Matter

Said defendant moves the court to dismiss this action for lack of jurisdiction of the subject matter and in this behalf shows:

(1) No diversity of citizenship exists and jurisdiction is not claimed on account of diversity of citizenship.

(2) It affirmatively appears from the face of plaintiffs' complaint that no Federal question is involved; that is, that the action does not arise "under the Constitution or laws of the United States." Plaintiffs allege in the complaint that "the action arises under the Natural Gas Act, 52 Stat. 821, et seq., 15 U. S. C. A. 717, et seq., as hereinafter more fully appears." This conclusion of the pleader is wholly unsupported by the allegations that follow in the complaint. From these allegations it does not appear that the action arises under the Natural Gas Act or under any other Federal law. To the contrary, it affirmatively appears from the complaint that the action does not "arise under the Natural Gas Act" or under any other Federal law; and in fact it does not arise under said Act or any other Federal law.

III

Motion to Drop Michigan-Wisconsin Pipe Line Company, a Corporation, as Plaintiff Herein

Said defendant moves the court to enter an order dropping Michigan-Wisconsin Pipe Line Company, a corporation, as plaintiff herein and in this behalf shows:

(1) This is an action brought by Phillips Petroleum Company, a corporation, and Michigan-Wisconsin Pipe Line Company, a corporation, as plaintiffs, seeking a declaratory judgment under Section 274-D of the Judicial Code, 28 U. S. C. A., Sec. 400, in respect to the rights of the parties under three certain contracts, one executed by the plaintiff Phillips Petroleum Company and the defendant [fol. 96] Skelly Oil Company, another executed by the plaintiff Phillips Petroleum Company and the defendant Magnolia Petroleum Company, and still another executed by the plaintiff Phillips Petroleum Company and the defendant Stanolind Oil and Gas Company. Each of said defendants under its contract agreed to sell and the plaintiff Phillips Petroleum Company agreed to buy certain gas subject to the terms, provisions and limitations set out in such contract.

(2) Michigan-Wisconsin Pipe Line Company is not a party to any of said contracts and the real parties in interest under said contracts are the Plaintiff Phillips Petroleum Company and each of said defendants respectively, as above set forth.

IV

Motion to Drop Defendant Stanolind Oil and Gas Company as Party; or, in the Alternative, for Severance of Claims

Said defendant moves the court to enter an order dropping it as defendant herein; or, in the alternative, to enter an order serving for separate trial, the claim asserted by the plaintiffs against it from the claim asserted by the plaintiffs in the same action against the defendants Magnolia Petroleum Company and Skelly Oil Company, respectively, and in support of this motion shows:

(1) In this action the plaintiffs have sued on three separate contracts as follows: (a) contract between the plaintiff Phillips Petroleum Company and this defendant; (b)

contract between the plaintiff Phillips Petroleum Company and the defendant Magnolia Petroleum Company; and (c) contract between the plaintiff Phillips Petroleum Company and the defendant Skelly Oil Company. This defendant is not a party to contracts (b) and (c) made by the plaintiff Phillips Petroleum Company and Magnolia Petroleum Company and Skelly Oil Company, respectively; and neither of said last named defendants are parties to the contract made between the plaintiff Phillips Petroleum Company and this defendant.

(2) The claim asserted by plaintiffs against this defendant does not arise out of the same transaction or occurrence [fol. 97] or series of transactions or occurrences as the claim asserted by plaintiffs against the defendant Magnolia Petroleum Company or the claim asserted by plaintiffs against the defendant Skelly Oil Company; nor do the three alleged claims involve questions of law or fact common to all defendants.

(3) This moving defendant will be put to undue expense and embarrassment if it is required to proceed with its defense without a severance of issues.

(4) The trial of the action will be embarrassed and confused by an attempted joint trial of the three claims, all to the prejudice of this defendant.

V

Motion to Dismiss or Abate Because of the Pendency of Another Action in the District Court of the United States for the Western District of Texas, Previously Filed and Involving, in Effect, the Same Controversy; or, in the Alternative, to Stay This Action Until the Other Action Is Disposed of

Said defendant moves the court to enter an order dismissing or abating this action as against it because of the pendency of another action in the District Court of the United States for the Western District of Texas previously filed and involving, in effect, the same controversy; or, in the alternative, to enter an order staying this action as against this defendant until such other action is disposed of, and in this behalf shows:

(1) That on the 20th day of May, 1947, this defendant instituted an action against Phillips Petroleum Company,

one of the plaintiffs herein, in the 126th District Court of Travis County, seeking, among other things, a declaratory judgment under the Texas Declaratory Judgment Act with respect to this defendant's right to terminate or cancel the identical contract referred to in plaintiffs' complaint herein between this defendant and the plaintiff Phillips Petroleum Company, a copy of the petition filed by this defendant as plaintiff in said action in said District Court of Travis County, Texas, being hereto attached and hereof made a part and marked Exhibit "A".

[fol. 98] (2) On the 16th day of June, 1947, Phillips Petroleum Company, plaintiff herein, defendant in the action in said State Court, filed its petition and bond for removal of said action from said State court to the District Court of the United States for the Western District of Texas, Austin Division, and an order attempting to effect said removal was entered upon said day in said State court; thereafter and on July 15, 1947, defendant filed its removal record in said District Court of the United States.

(3) It affirmatively appears from this defendant's said petition (Exhibit "A" hereof) and plaintiffs' complaint filed herein, that the two actions involve, in effect, the same subject matter, and that a judgment entered in the action that was first filed in said District Court of Travis County, Texas, will effectively dispose of the entire controversy between the plaintiffs herein and this defendant concerning this defendant's right to terminate said gas purchase contract and concerning the effectiveness of its cancellation.

(4) This defendant further shows that said action in said District Court of Travis County, Texas, is not one arising under the Constitution or laws of the United States and is not one falling within the original jurisdiction of a court of the United States and is not one removable into a court of the United States, and this defendant did upon the 6th day of August, 1947, file in said District Court of the United States its motion to remand, and will seek an order remanding, said action to said District Court of Travis County, Texas, in which it was originally filed.

Fellows & Fellows, Ray S. Fellows, Dan Moody, Black & Stayton, Charles L. Black, Attorneys for the Defendant Stanolind Oil and Gas Company.

Of Counsel, Donald Campbell, L. A. Thompson.

[fol. 99] NOTE RE EXHIBIT

[Exhibit A attached to the foregoing motions is a copy of the petition filed by Stanolind Oil and Gas Company in the District Court of Travis County, Texas, a copy of which appears at pages 82 to 88 of this printed record as a part of exhibit B attached to the consolidated motions of Skelly Oil Company above.]

Filed September 2, 1947.

IN UNITED STATES DISTRICT COURT

CONSOLIDATED MOTIONS OF MAGNOLIA PETROLEUM COMPANY —Filed September 4, 1947

I. To Dismiss and quash service for improper venue and lack of jurisdiction over the person;

II. To dismiss for lack of jurisdiction over the subject-matter;

III. To drop Magnolia Petroleum Company from the action for improper joinder, or, in the alternative, for severance;

IV. To drop Michigan-Wisconsin Pipe Line Company as a party plaintiff; and,

V. For enlargement of time.

Defendant Magnolia Petroleum Company, which is not now, and at the time of the commencement of this action was not, an inhabitant of or found within the Northern District of Oklahoma, moving by one set of motion papers for the convenience of the Court, presents the following motions pursuant to Rule 12(b) of the Rules of Civil Procedure for the District Courts of the United States:

I

Motion to Dismiss and Quash Service for Improper Venue and Lack of Jurisdiction over the Person

For judgment pursuant to Rule 12(b) of said Rules of Civil Procedure, dismissing this action as against Magnolia Petroleum Company and quashing the service of summons made upon this defendant and the return thereof, be-

cause of improper venue and lack of jurisdiction over the person of this defendant, on the grounds that the action is brought in the wrong district and the service of summons [fol. 100] was unauthorized and did not confer jurisdiction over the person of this defendant; in that:

1. As appears from plaintiffs' complaint, jurisdiction is invoked solely on the claim that the action arises under the laws of the United States, and there is not present in this action the diversity of citizenship requisite, under the provisions of Section 51 of the Judicial Code, as amended, to jurisdiction and venue in this court over this defendant.

2. Magnolia Petroleum Company is not an inhabitant of the Northern District of Oklahoma within the meaning of Section 51 of the Judicial Code, as amended, but is a corporation organized and existing under the laws of the State of Texas with a license to transact business within the State of Oklahoma; and, under Section 452, Title 18, Oklahoma Statutes, 1941, it has designated a service agent who is a citizen and resident of Oklahoma City, Oklahoma County, Oklahoma, where the principal offices of the corporation in Oklahoma are located, upon whom, as provided in said Section 452, service of process may be had only in an action brought in the county of the state of Oklahoma in which the cause of action arose.

3. It does not appear from the complaint, nor is it a fact, that the claim asserted by plaintiffs in their complaint arose in Tulsa County, Oklahoma, or in any other county within the Northern District of Oklahoma, within the meaning of Section 452, Title 18, Oklahoma Statutes, 1941; and Magnolia Petroleum Company has not given its consent to be sued in this action in the Northern District of Oklahoma.

4. As appears from plaintiffs' complaint, the right to relief asserted by plaintiffs against this defendant is not in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, as the right to relief asserted by plaintiffs against defendant Skelly Oil Company, or as the right to relief asserted by plaintiffs against defendant Stanolind Oil and Gas Company; and venue of the action as against this defendant is not maintainable in the Northern District of Oklahoma under Section 52 of the Judicial Code.

[fol. 101] II

Motion to Dismiss for Lack of Jurisdiction over the Subject-matter

For judgment, pursuant to Rule 12(b) of said Rules of Civil Procedure, dismissing this action on the ground that the Court lacks jurisdiction over the subject-matter, in that:

1. Plaintiffs do not ground or claim jurisdiction in this court on the basis of diversity of citizenship, and it appears from the face of the complaint that the requisite diversity of citizenship essential to the jurisdiction of this court is not present in this action.

2. While plaintiffs assert in their complaint that jurisdiction is founded "on the existence of a federal question" and that "the action arises under the Natural Gas Act, 52 Stat. 821", the conclusions so alleged are wholly unsupported by the allegations which follow, and it does not appear therefrom that the case arises under the Natural Gas Act or any other federal law or statute; and, on the contrary, it affirmatively appears from the complaint that no federal question is involved in the suit, and that this court does not have jurisdiction over plaintiffs' claim under any statute or law of the United States.

III

Motion to Drop Magnolia Petroleum Company from the Action for Improper Joinder, or, in the Alternative, for Severance

For an order, pursuant to Rules 12(b) and 21 of said Rules of Civil Procedure, dropping this defendant from the action, or, in the alternative, for an order, pursuant to Rules 20(b), 21 and 42(b) of said Rules of Civil Procedure, severing for separate trial the action against this defendant, in that:

1. The right to relief asserted by plaintiffs against this defendant is not in respect of and does not arise out of the same transaction, occurrence, or series of transactions or occurrences, as the rights asserted by plaintiffs against defendants Skelly Oil Company and Stanolind Oil and Gas Company within the meaning of Rule 20(a) of said Rules

[fol. 102] of Civil Procedure; and, on the contrary, it affirmatively appears from the allegations of the complaint that plaintiffs' asserted right to relief against this defendant arises out of an alleged contract between plaintiff Phillips Petroleum Company and this defendant, while plaintiffs' asserted right to relief against defendant Stanolind Oil and Gas Company arises out of an alleged contract between plaintiff Phillips Petroleum Company and Stanolind Oil and Gas Company, and plaintiffs' asserted right to relief against defendant Skelly Oil Company arises out of an alleged contract between plaintiff Phillips Petroleum Company and Skelly Oil Company; and, as appears from the complaint, this defendant is not a party to either of the last two mentioned contracts, and neither Skelly Oil Company nor Stanolind Oil and Gas Company is a party to the first mentioned contract; and this defendant does not assert any claim against defendant Skelly Oil Company or defendant Stanolind Oil and Gas Company, nor does either of those defendants assert a claim against this defendant.

2. This defendant will be embarrassed and put to undue expense if it is required to proceed with its defenses without severance of the issues and parties, and a separate trial of the claim asserted by plaintiffs against it.

IV

Motion to Drop Michigan-Wisconsin Pipe Line Company as a Party Plaintiff

For an order, pursuant to Rule 21 of said Rules of Civil Procedure, dropping Michigan-Wisconsin Pipe Line Company as a party plaintiff, on the ground that:

1. As appears from plaintiff's complaint, Phillips Petroleum Company and Michigan-Wisconsin Pipe Line Company as plaintiffs pray for a declaratory judgment under Section 274d, Judicial Code, (48 Stats. 955, as amended) in respect to the rights of the parties under three separate contracts, executed between Phillips Petroleum Company and Skelly Oil Company, between Phillips Petroleum Company and Stanolind Oil and Gas Company, and between Phillips Petroleum Company and this defendant, respectively; each of said contracts being one whereby Phillips [fol. 103] Petroleum Company agreed to buy natural gas

from the particular defendant who was a party thereto, and such defendant agreed to sell natural gas to Phillips Petroleum Company. Plaintiff Michigan-Wisconsin Pipe Line Company was not, and is not, a party to any of said contracts; and, as appears from the complaint, the real parties at interest, and the only parties at interest, under each of said separate contracts are Phillips Petroleum Company and the particular defendant who executed the same.

V

For Enlargement of Time

If the action be not dismissed as against this defendant, For an order extending the time for this defendant to answer the complaint herein until sixty (60) days after entry of all orders disposing of the motions hereinbefore set forth.

Defendant Magnolia Petroleum Company prays that the foregoing motions be sustained and for judgment or orders accordingly in its favor thereon.

Walace Hawkins, Raymond M. Myers, W. R. Wallace, Dan Moody, by W. R. Wallace; Attorneys for Defendant Magnolia Petroleum Company.

Filed September 4, 1947.

In United States District Court

Amendment to Complaint—Filed October 27, 1947.

The plaintiffs hereby amend paragraph 1 of their complaint to read as follows:

1. The Court has jurisdiction as to all defendants herein because of the existence of a federal question and the amount in controversy, and as to the defendant Magnolia Petroleum Company the Court has jurisdiction because of [fol. 104] diversity of citizenship and the amount in controversy as to that defendant. The action arises under the Natural Gas Act, 52 Stats. 821, et seq., 15 U.S.C.A. 1717, et seq., as hereinafter more fully appears. The matter in controversy as to each plaintiff on the one hand and each defendant on the other exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

The plaintiffs amend paragraph 7 of their complaint by making the following additional allegations:

On November 30, 1946, after a lengthy hearing upon the application of plaintiff pipe line company to obtain said certificate of public convenience and necessity, the Federal Power Commission held a session for the purpose of deciding upon and issuing its order in said proceeding, and on that day after consideration of the evidence and views presented by the various participants in said proceeding the Commission did announce and issue its order granting unto the plaintiff pipe line company a certificate of public convenience and necessity, with conditions attached. On said day the Commission directed and caused the Secretary of said Commission to notify by telegrams the participants and persons interested in said proceeding that a certificate of public convenience and necessity, with conditions, was issued on said date to the plaintiff pipe line company. A copy of the telegram so sent on said day by said Secretary is as follows (omitting the addresses):

"Commission today adopted findings and order, denying motion of Panhandle Eastern Pipe Line Company to dismiss application of Michigan Wisconsin Pipe Line Company in docket No. G-669. Commission adopted findings and order in docket No. G-706, issuing certificate of convenience and necessity to Panhandle Eastern Pipe Line Company. Commission adopted opinion and order in docket No. G-669, issuing certificate, with conditions, to Michigan-Wisconsin Pipe Line Company. Supporting and dissenting opinions in last named docket will be available at early date. All orders available afternoon December 2.

Leon M. Fuquay, Secretary Federal Power Commission"

[fol. 105] Also on said 30th day of November, 1946, the Commission directed that said order be mimeographed by the Secretary and mimeographic copies be filed in the proceeding and be circulated to the participants in the proceeding and persons interested therein. Accordingly and on the 2nd day of December, 1946, the Secretary did cause said order to be mimeographed and filed mimeographic copies in said proceeding and made available to the participants in said proceeding and to other persons interested therein said mimeographic copies. A copy of the order of the Com-

mission is hereto attached marked "Exhibit 2," and made a part hereof.

The plaintiffs assert and allege that the actions of said Federal Power Commission on November 30, 1946, constituted the issuance on said date of a certificate of public convenience and necessity under the requirements of the Natural Gas Act. Said Act provides in Section 717n (b) that "All hearings, investigations and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission" and in Section 717o that "Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe". Under the procedure of said Commission then in effect pursuant to the terms and provisions of said Act, and particularly those sections last mentioned, the actions and proceedings of the Commission did constitute the issuance by the Commission of a certificate of public convenience and necessity on November 30, 1946, and did constitute the issuance of such a certificate prior to said telegraphic notices by the defendants to the plaintiff Phillips on December 2, 1946. The defendants contend and assert otherwise and in doing so they fail to properly construe, or to give appropriate effect to, said Act and the rules, regulations and procedure of said Federal Power Commission then in effect pursuant to the terms and provisions of said Act.

As said order of the Commission recites, the certificate of public convenience and necessity issued to the plaintiff pipe line company contained certain conditions, by reason of which the defendants contend that the certificate of [fol. 106] public convenience and necessity issued to said plaintiff pipe line company prior to said telegraphic notices given by the defendants was insufficient and entitled the defendants to terminate the said contracts. The Natural Gas Act contemplates and provides that "The Commission shall have power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." Section 717f (e). The plaintiffs assert and allege that the conditions attached to the issuance of said certificate were such as came within the provisions of said Act and were such as were contemplated by said Act and were provided for therein and, hence, that the said certificate issued to the plaintiff pipe line company prior to the said notices by the defendants was one issued

"within the requirements of the Natural Gas Act", and therefore the defendants had no right to terminate said contracts as they endeavored to do on December 2, 1946. The actions of the defendants in endeavoring to terminate said contracts on December 2, 1946, and the controversy herein involved necessarily bring into play and call for the construction of said Act and the effect to be given to it. Contrary to the actions and contentions of the defendants, these plaintiffs assert and allege that if said Act is properly construed and is given appropriate effect the said certificate issued to the plaintiff pipe line company was one "within the requirements of the Natural Gas Act" and, accordingly, that the defendants have no right to terminate any of said contracts.

Wherefore, the plaintiffs renew their prayer as set forth in their complaint herein.

Don Emery, Rayburn L. Foster, R. B. F. Hummer, H. K. Hudson, George L. Sneed, Harry D. Turner; Attorneys for Plaintiff, Phillips Petroleum Company.

[fol. 107] Donald R. Richberg, Charles V. Shannon, Eugene O. Monnet; Attorneys for Plaintiff, Michigan-Wisconsin Pipe Line Company.

Filed October 27, 1947.

(Exhibit 2 attached to the foregoing amendment to complaint is the same as plaintiff's exhibit 5.)

IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY OF ORDER ON DEFENDANTS' MOTIONS—October 29, 1947

On this the 29th day of October, 1947, the above cause comes on for further hearing upon the Consolidated Motions of the defendants herein. Prior to this date the plaintiffs filed an amendment to their complaint and no objection was made on the part of any of the defendants to the filing of such amendment. Said motions are deemed to have been refiled and are to be considered as directed to the complaint as amended. After consideration of the briefs and argument of counsel, it is Ordered that the Consolidated Motions

of each of the defendants be, and they are hereby, overruled and denied, except Part III of the Consolidated Motions of the defendants Skelly Oil Company and Stanolind Oil and Gas Company and Part IV of the Consolidated Motions of Magnolia Petroleum Company, which parts move to drop Michigan-Wisconsin Pipe Line Company as a party plaintiff and are hereby sustained and, accordingly, said Michigan-Wisconsin Pipe Line Company is hereby dropped and stricken as a party plaintiff in this action.

Each defendant shall have thirty days from this date within which to file an answer in this cause.

Royce H. Savage, District Judge.

O. K. as to form:

Rayburn L. Foster, R. B. F. Hummer; Attorneys for Plaintiff, Phillips Petroleum Company. Charles V. Shan- [fol. 108] non, by EOM, Eugene O. Monnet, Attorneys for Plaintiff, Michigan-Wisconsin Pipe Line Company. W. P. J. German, Attorneys for Defendant, Skelly Oil Company. Donald Campbell, L. A. Thompson for Ray S. Fellows, Attorneys for Defendant, Stanolind Oil and Gas Company. Dan Moody, Attorneys for Defendant, Magnolia Petroleum Company.

Filed November 24, 1947.

In United States District Court

Answer of Defendant Skelly Oil Company—Filed November 28, 1947

Comes now the defendant Skelly Oil Company, and for its answer to plaintiff's complaint as amended, admits, denies, alleges, and states as follows:

First Defense

The complaint as amended fails to state a claim against this defendant upon which relief can be granted.

Second Defense

(1) Defendant denies all the allegations of paragraph 1 of the complaint as amended.

(2) Defendant admits all the allegations of paragraph 2 of the complaint as amended except that this defendant

has no knowledge as to whether the defendant Magnolia owns substantial property at Tulsa, Oklahoma.

(3) Defendant admits that an actual controversy exists as between plaintiff and this defendant as to whether the contract of December 5, 1945 between the plaintiff and this defendant was terminated on December 2, 1946, (the reference to the plaintiff being to Phillips Petroleum Company, the court having by prior order dropped the plaintiff [fol. 109] Michigan-Wisconsin Pipe Line Company from this action), but denies the remainder of the allegations of paragraph 3 of the complaint as amended.

(4) Defendant admits the allegations of paragraph 4 of the complaint as amended.

(5) Defendant admits the allegations contained in the first and last sentences of paragraph 5 of the complaint as amended and that a true and correct copy of the contract between plaintiff and this defendant is attached to said complaint. Defendant has no knowledge as to the remainder of the allegations contained in said paragraph 5.

(6) This defendant admits the allegations of paragraph 6 of the complaint as amended, except those which have in effect been stricken by the order of the court dropping Michigan-Wisconsin Pipe Line Company as a party plaintiff, and except those contained in the sixth sentence of said paragraph to the effect that Michigan-Wisconsin Pipe Line Company obtained on November 30, 1946 a certificate of public convenience and necessity from the Federal Power Commission in accord with the requirements of the Natural Gas Act and the rules, regulations, and procedure of said Commission, which allegations are specifically denied.

(7) Defendant denies all of the allegations of paragraph 8 of the complaint except these specifically admitted as follows:

(a) Defendant admits the sending of the telegrams set forth in said section on the dates alleged and by the respective parties to which each is attributed and as to the telegrams dispatched by the defendants alleges that each was received by plaintiff prior to the issuance of a certificate to Michigan-Wisconsin.

(b) Admits that it claims that no certificate of public convenience and necessity within either the requirements of the Natural Gas Act or the requirements of said contract between plaintiff and this defendant was issued to Michigan-Wisconsin by the Federal Power Commission at or prior to the receipt by plaintiff of defendant's said tele-
[fol. 110] graphic termination notice, and alleges that no such certificate had been so issued at or prior to said time.

(c) Admits that it claims that its telegraphic termination notice had the effect of terminating the contract of December 5, 1945 between plaintiff and itself.

(8) Defendant alleges that at and prior to the time at which plaintiff received defendant's said termination notice, the Federal Power Commission was without jurisdiction to issue a certificate of public convenience and necessity to Michigan-Wisconsin; that the order bearing date of November 30, 1946, a copy of which is Exhibit "2" to the amendment of the complaint, was, as is shown on its face, void, invalid, illegal and unconstitutional because made in excess of the powers delegated to said Commission by the Natural Gas Act and for the same reason it was not and could not be and constitute a certificate either in law or within the contemplation of said contract; that, if the Natural Gas Act is construed to authorize the Commission to issue a certificate under the circumstances surrounding the purported issuance of said order dated November 30, 1946, then said Act is unconstitutional in that it constitutes an unlawful delegation of legislative power in violation of Section 1 of Article I of the Constitution of the United States and a deprivation of due process of law in violation of the Fifth Amendment thereto, in either of which events said order dated November 30, 1946 was not at or prior to the receipt of said telegraphic termination notice an issued certificate or a certificate subject to be issued by said Commission.

(9) Defendant denies the allegation of paragraph 9 of the complaint.

(10) Defendant alleges that the termination provisions of said contract of December 5, 1945 between plaintiff and this defendant contemplated that, if a final, valid and effective certificate pursuant to which Michigan-Wisconsin

could proceed immediately with the construction and operation of its proposed pipeline was not issued by the Federal Power Commission by December 1, 1946, then this defendant would thereafter have the right to terminate said con-
[fol. 111] tract, provided defendant did so prior to the issuance of such a final, valid and immediately effective certificate, time being of the essence of said contract in that respect. And alleges that no such certificate had been issued, that in fact no certificate at all had been issued to Michigan-Wisconsin, prior to the delivery of defendant's termination notice to plaintiff on December 2, 1946.

(11) Defendant alleges that prior to December 1, 1946, being informed that the Federal Power Commission had not as yet issued to Michigan-Wisconsin a certificate of public convenience and necessity for the construction and operation of its proposed pipeline, it decided to terminate its contract with plaintiff by sending to plaintiff telegraphic notice of such termination early on December 2, 1946 in the event a certificate was not issued on or prior to December 1, 1946. However, about 8:00 o'clock A. M. on Monday, December 2, 1946, defendant received from plaintiff a telegram dated December 1, 1946, reading:

"Federal Power Commission issued certificate to Michigan Wisconsin Pipe Line Company Saturday November 30. We are awaiting written order and will supply you copy upon receipt."

Defendant relied on the correctness of the statement contained in the first sentence of said telegram until at approximately 4:00 o'clock P. M., C. S. T. December 2, 1946, when defendant ascertained that plaintiff's said telegram was erroneous in that no certificate had been issued to Michigan-Wisconsin on November 30, and that in fact no such certificate had as yet been issued, and thereupon defendant dispatched to plaintiff defendant's telegraphic notice (charges prepaid) copied in paragraph (8) of plaintiff's complaint, which telegram was received in due course by plaintiff at Bartlesville, Oklahoma, on said December 2. That, if the Federal Power Commission issued its said order dated November 30, 1946 at sometime December 2, 1946, which, however, this defendant does not admit but denies, and if defendant's said telegram to plaintiff was received by plaintiff after such issuance, then it is alleged

that except for the false, erroneous and misleading tele-
[fol. 112] gram sent by plaintiff to defendant under date of December 1 which caused defendant to delay the dispatch of its said termination notice, said telegram would have been dispatched by defendant on the morning of December 2, 1946 is ample time for it to have reached plaintiff before the issuance of said order; that by virtue of said conduct on the part of plaintiff, plaintiff is estopped to deny that it received defendant's termination notice prior to the time that said order was so issued, if in fact it was issued prior to defendant's receipt of said telegram.

(12) Defendant admits all the allegations of paragraph 7 of the original complaint. As to the allegations contained in plaintiff's amendment of said paragraph 7 of said complaint the defendant denies each and all thereof except such as are admitted in the following sub-paragraphs (a) to (f) hereof:

(a) This defendant has no knowledge as to when the Commission dispatched the telegram bearing date of November 30, 1946, but alleges that said telegram was not an official act of the Commission bearing any relation to or as a step in the proceedings for the issuance of the purported certificate of public convenience and necessity and that the sending thereof did not constitute the issuance of either the order bearing date of November 30, 1946, or of the purported certificate purported to be issued in said order. Furthermore, defendant alleges that that portion of said telegram which reads:

"Commission adopted opinion and order in Docket No. G-669, issuing certificate, with conditions, to Michigan-Wisconsin Pipe Line Company. Supporting and dissenting opinions in last named Docket will be available at early date."

erroneously and falsely stated that the Commission had adopted an opinion in said proceeding. The term "opinion" as used by the Commission means the making and adoption by the Commission of written discussions and findings of the basic and essential jurisdictional facts, based on a consideration and weighing of the evidence received by it in support of or against an application for a certifi-
[fol. 113] cate. The Docket number, G-669, referred to in

said portion of said telegram is the number given by the Commission to the application of Michigan-Wisconsin for a certificate. Defendant alleges that the Commission had not on November 30, 1946, adopted its opinion in support of the ultimate conclusions contained in said order; that the Commission did not adopt any opinion in said case until January 17, 1947 and the opinion it adopted on that date did not deal with all of the subject matter involved nor make all of the findings of basic and essential jurisdictional facts required as a prerequisite to the issuance of a certificate to Michigan-Wisconsin. The said opinion of January 17, 1947 was not issued by the Commission until on February 7, 1947. The Commission did not finally complete, and then make and adopt, its opinions in said matter until February 20, 1947, at which time a supplemental opinion was adopted by it, which supplemental opinion was not issued until March 12, 1947. In this connection, defendant further alleges that the Commission was without power or authority under provisions of the Natural Gas Act to issue or to provide for the issuance of a certificate to Michigan-Wisconsin prior to the making and filing of written findings of basic and essential jurisdictional facts entitling said company to the issuance of its applied for certificate.

(b) This defendant admits that it contends that the conditions contained in the order dated November 30, 1946 were such as to entitle this defendant to terminate its contract with the plaintiff at the time it served its termination notice on the plaintiff.

(c) As to the statutory provision, referred to in the complaint as amended, which authorizes the Commission to prescribe the effective dates of its orders, defendant denies that said order dated November 30, 1946 contains any provision specifying a date upon which it is to become effective, and alleges that paragraph (C) of said order specifies that it shall be deemed to be issued, (as distinguished from rendered, entered or effective,) at an unspecified future date which, as appears from the face of said order, would be long after December 2, 1946, and hence long after [fol. 114] the receipt by plaintiff of this defendant's said telegraphic notice of termination.

(d) This defendant denies that the Federal Power Commission has authority, as alleged in substance by plaintiff,

to issue certificates of public convenience and necessity retroactively.

(e) This defendant denies that, under the procedure of the Commission in effect on and subsequent to November 30, 1946, the actions and proceedings of the Commission in said matter constituted the issuance of a certificate of public convenience and necessity to Michigan-Wisconsin prior to the receipt by plaintiff of this defendant's said telegraphic notice of termination. Defendant alleges that Rule 13(b) of the Commission's Rules of Practice and Procedure which were adopted and promulgated on August 23, 1946, effective as of September 11, 1946, provides—

"Issuance of Orders. In computing any period of time involving the date of the issuance of an order by the Commission, the day of issuance of an order shall be the day the Office of the Secretary mails or delivers copies of the order (full text) to the parties or their attorneys of record, or makes such copies public, whichever be the earlier. The day of issuance of an order may or may not be the day of its adoption by the Commission. In any event, the Office of the Secretary shall clearly indicate on each order the date of its issuance."

That prior thereto the Commission had no written rule regarding the determination of the issuance dates of its orders except Rule 1.183 (Sec. 50.75, Book IV Code of Federal Regulations, p. 4540) which provided that "A petition for rehearing must be filed within 30 days after service of the order therein." Because Sec. 717r(a) of the Natural Gas Act provides that applications for rehearing must be filed within 30 days after the issuance of an order, said Rule 1.183 had the effect of making the date upon which an order was served also the date upon which it was issued. Also that Rule 13(b) merely constituted a reduction to writing of the custom and practice previously observed by the Commission in determining the issuance dates of its orders; that by official notice dated September [fol. 115] 20, 1946, the Commission through its Secretary advised all persons affected by its rules that said rules effective September 11, 1946 would be applied in so far as possible in cases initiated prior to September 11, 1946; that none of the acts set forth in either former Rule 1.183 or new Rule 13(b) as constituting the issuance of an order had been

done with respect to the order dated November 30, 1946 prior to the receipt by plaintiff of this defendant's said telegraphic notice of termination, if indeed any thereof were ever afterwards done.

(f) Defendant states that it is informed and believes, and on information and belief alleges the facts to be, that it was not until on December 2, 1946 that the Commission reached its conclusion as to the full content and substance of its order dated November 30, 1946 and completed the draft of said order. It admits that mimeographed copies thereof were made available on said December 2 to some, but denies it was made available to all of the participants in said proceedings; but it alleges that the making of same so available did not constitute the issuance of said order either as an order or as a certificate of public convenience and necessity authorizing Michigan-Wisconsin to proceed to construct and operate its proposed pipeline. However, defendant alleges that in any event such copies were not made so available until after the delivery of defendant's termination notice to the plaintiff, or if the defendant is in error in this respect then that the plaintiff is estopped, by reason of the facts alleged in paragraph 11 of this answer, to assert that said notice was not delivered before said copies were so made available to said participants.

(13) Defendant alleges that subsection (c) of Section 7 of the Natural Gas Act as amended in 1942 (U. S. C. Section 717f(c)) prohibits any natural gas company from engaging in the transportation or sale of natural gas or from undertaking the construction of any facilities for the transportation or sale of natural gas or the acquiring of any such facilities "unless there is in force with respect to such natural gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts [fol. 116] or operations" and it further provides that "the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly", and subsection (e) of said section provides that a certificate shall be issued to any qualified applicant therefor "if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter . . ., and that the proposed

service, sale, operation, construction, ... to the extent authorized by the certificate, is or will be required by the present or future convenience or necessity; otherwise such application shall be denied." That, under these plain provisions of said Act, and in view of the specific findings and conditions recited in the order dated November 30, 1946, said order was void at the time it was made in so far as it under took to be and constitute the issuance of a certificate.

(14) Defendant alleges that in paragraph numbered "(4)" of its order dated November 30, 1946, the Commission expressly found and concluded that:

"(4) Applicant has secured substantial reserves of natural gas and has submitted reasonable proof of the financial and economic feasibility of its project in the event of its construction and operation after all necessary approvals and consents shall have been secured. It has not yet obtained, however, all the necessary approvals of operation from the State of Wisconsin and the communities to be served therein or of its proposed financing from the Securities and Exchange Commission. The authorization herein granted should be expressly conditioned upon the obtaining of all such necessary consents and approvals, without which the project can be neither financed, constructed, nor operated."

Having so found specifically concerning the lack of ability of Michigan-Wisconsin, the Commission was wholly without authority to make its general finding "(6)" that Michigan-Wisconsin was able to do the acts and perform the service it proposed to do and perform. As the result of said find- [fol. 117] ing "(4)", the Commission attached to its purported granting of the application the following conditions:

"(i) That there shall be no transportation or sales of natural gas, subject to the jurisdiction of the Commission, by means of the facilities herein authorized until all necessary authorizations shall have been obtained from the State of Wisconsin and each of the communities proposed to be served in said state, as specified in the application, as amended, to the extent and in the manner required by Sections 196.49(4a) and 196.58(b) of Chapter 48 of the Statutes of the State of Wisconsin.

"(iii) Applicant shall obtain approval of its proposed plan of financings by the Securities and Exchange Commission, and the grant of the certificate herein authorized shall be without prejudice to any action which may be taken by that Commission."

Said conditions were, under the aforesaid provisions of said Act, conditions precedent to the authority of the Commission to grant the application of Michigan-Wisconsin for a certificate, and its action pretending to do so was utterly void. Neither of said conditions had been met and complied with prior to the delivery by this defendant of its termination notice to the plaintiff. This defendant is not informed as to whether said conditions have as yet been met and alleges that, if they have been, they were complied with long after December 2, 1946.

(15) Defendant alleges that in its order dated November 30 the Commission also attached to the issuance of its purported certificate conditions (v) and (vi), which also had the effect of prohibiting Michigan-Wisconsin from proceeding to acquire, contract or operate its proposed facilities unless and until said conditions were met. Said conditions read as follows:

"(v) That there shall be no transportation or sale of natural gas, subject to the jurisdiction of the Commission, by means of the facilities herein authorized, unless a proper application for a certificate of public convenience and necessity is filed within fifteen days by the Austin Field Pipeline Company and a certificate is granted by this Commis- [fol. 118] sion for the construction and/or operation of facilities necessary to transport the required volume of gas from the aforementioned Austin and Reed City Storage Fields to the city gates of Mt. Pleasant, Ann Arbor, and Detroit, Michigan, including natural-gas transmission pipe lines extending from the Austin to Reed City Storage Fields and from the Austin Storage Field to the city gates of Mt. Pleasant, Ann Arbor, and Detroit, and additional compressor facilities in the Austin Storage Field.

"(vi) That there shall be no transportation or sale of natural gas subject to the jurisdiction of the Commission, by means of the facilities herein authorized, until a proper

application for a certificate of public convenience and necessity is filed by the Michigan Consolidated Gas Company for the construction and/or operation of certain necessary additional facilities in the Austin and Reed City Storage Fields."

These two conditions were conditions precedent; they were dependent upon not only the filing by the Austin Field Pipeline Company and the Michigan Consolidated Gas Company of applications for certificates of public convenience and necessity, but also the hearing of said applications and the eventual granting thereof. Therefore, said order, as a purported certificate, did not and could not, by its terms, become a certificate in any event unless and until said conditions were met. They were not met until long after December 2, 1946.

(16) Panhandle Eastern Pipe Line Company, the holder and owner of a so-called "Grandfather" certificate covering a portion of the territory, to wit, the Detroit and Ann Arbor, Michigan, markets, which were sought to be served by Michigan-Wisconsin, intervened in said Docket No. G-669 and opposed the granting of the application of Michigan-Wisconsin for a certificate. In its general finding numbered "(3)" in said order dated November 30, 1946, the Commission dealt with the conflicting interests of Panhandle Eastern and Michigan-Wisconsin and therein, among other things, found:

"Augmentation of the supply of natural gas to the market areas here in question through the facilities proposed to [fol. 119] be constructed and operated by Applicant will be in the public interest, provided proper protection and recognition are given to Panhandle's rights and obligations in the said Michigan markets. An appropriate condition should be provided for the purpose."

As a result of said finding the Commission attached condition precedented "(viii)" to its purported granting of the application reading:

"(viii) This certificate is granted upon the express condition that the facilities herein authorized shall not be used for the transportation for or sale of gas to the Michigan Consolidated Gas Company for resale in Detroit and Ann Arbor except with due regard to the rights and duties

of Panhandle Eastern in its established service for resale in Detroit and Ann Arbor, Michigan, under its presently existing contract with Michigan Consolidated and in accordance with the provisions of the Natural Gas Act; and such rights and duties shall by supplemental order, to be issued within fifteen days from the date of this order, be determined on the basis of:

"(1) Panhandle's rights, obligations and service under its Grandfather certificate and subsequent certificates when such certificates were granted by this Commission;

"(2) Panhandle's contractual and actual deliveries of natural gas for resale in the years 1942, 1943, 1944, 1945 and 1946;

"(3) Panhandle's rights and obligations at the date of termination of the existing contract, on December 31, 1951." The Commission not yet having determined the portion of the Detroit and Ann Arbor, Michigan, markets for gas which Panhandle Eastern was obligated and had the right to serve, it was impossible at the time of the making of said order dated November 30, 1946 for the Commission to determine the extent of the present or prospective demand for natural gas in said markets which might be satisfied by Michigan-Wisconsin, and consequently it was impossible for the Commission then to determine (as it was first required to do by the provisions of subsection (e) of Section 717f of said Act) whether the remaining demand for natural gas [fol. 120] in said areas was sufficient in volume for the public convenience and necessity to require the rendition of the service which Michigan-Wisconsin proposed to render. As a result the Commission was without jurisdiction at the time it made said order dated November 30 to make and enter the same or to issue a certificate to Michigan-Wisconsin. No determination of said question was made by the Commission until long after the service by this defendant of its termination notice upon the plaintiff. Said subject was dealt with by the Commission in its aforesaid supplemental opinion adopted February 20, 1947, but not issued by the Commission until March 12, 1947, on which later date the Commission issued its supplemental order covering that matter and holding that only a portion of said Detroit and

Ann Arbor, Michigan, markets might be served by Michigan-Wisconsin.

(17) Defendant further alleges that on its face said order shows that, unless the aforesaid conditions (ii), (iii), (v), (vi) and (viii) should be met and complied with, the said order of November 30 would never become effective and final, and that until they were met and complied with the Commission itself did not intend that said order should become effective and should constitute its authorization for the issuance of a certificate to Michigan-Wisconsin.

(18) Defendant further alleges,

(a) That subsequent to December 2, 1946, but within thirty (30) days after November 30, 1946, Panhandle Eastern filed with the Commission an Application for Rehearing with respect to the order dated November 30, 1946; Exhibit "2" attached to plaintiff's complaint as amended. Sections 717r(a) and 717r(b) of the Natural Gas Act provides that unless a person aggrieved by an order of the Commission files with the Commission within thirty (30) days "after the issuance" thereof an application for rehearing, he shall have no right to seek a review of such order by the court. The Commission on January 14, 1947 denied said application for rehearing on the ground that the same was premature in that said order dated November 30 did not constitute the final administrative action of the Commission with reference to said proceeding because, re- [fol. 121] ferring to paragraph lettered "(C)" of the order dated November 30, the Commission had not yet made or issued the opinion and supplemental order referred to therein. The necessary, actual and legal effect of said ruling of the Commission was that neither its order dated November 30 nor the purported certificate therein pretended to be issued had yet been issued for any purpose.

(b) That within sixty (60) days after said application for rehearing had been denied Panhandle Eastern Pipe Line Company filed a written petition in the United States Court of Appeals for the District of Columbia seeking, under the last above cited provisions of said Act, a judicial review of said order dated November 30 and of the said denial of its application for rehearing; that sua sponte said

court on April 21, 1947 dismissed said appeal without prejudice on the ground that said order dated November 30 "was not a final order because it required for completion the issuance of a supplemental order or orders, and the other orders above mentioned not being final and not having made final said order of November 30, 1946." Thereafter and within the time allowed by law, the Panhandle Eastern petitioned the Supreme Court of the United States for a writ of *certiorari* with respect to the order of said Circuit Court of Appeals dismissing said review proceeding, which said petition was denied by the Supreme Court.

(c) Therefore the said determination of the Commission itself in said proceedings and the decisions of said courts have foreclosed the right of plaintiff herein to assert or contend that the order of November 30, 1946, or any action taken by the Commission or its Secretary constituted the issuance of a certificate to Michigan-Wisconsin prior to the receipt by plaintiff of defendant's said termination notice.

Wherefore, defendant prays:

1. That, as authorized by Rule 7(a) of the Rules of Civil Procedure the plaintiff be required to reply hereto in accordance with the rules applicable to answers, that is, that plaintiff be required to admit or deny each allegation of new matter contained in this answer.

[fol. 122] 2. That it be adjudged that no certificate of public convenience and necessity had been issued by the Federal Power Commission to Michigan-Wisconsin Pipe Line Company at or prior to the time when on December 2, 1946, defendant served its notice on the plaintiff terminating the contract between defendant and plaintiff dated December 5, 1945.

3. That it be adjudged that said contract of December 5, 1945 was in law and in fact terminated on December 2, 1946 by said termination notice, and thereupon became and was canceled and no longer binding on this defendant.

4. That the plaintiff be enjoined from hereafter asserting any rights against this defendant under said contract.

5. That this defendant have judgment for its costs and for such other and further relief as to the court may seem just and equitable.

W. P. Z. German, John F. Jones, W. P. Z. German, Jr., Attorneys for the defendant, Skelly Oil Company. Of Counsel, Hawley C. Kerr.

[Certificate of Service Attached to Original.]

Filed November 28, 1947.

Answer of Stanolind Oil and Gas Company to the Complaint, as Amended—Filed November 28, 1947

The defendant Stanolind Oil and Gas Company answers the plaintiff's complaint, as amended, as follows:

First Defense

The Court is without jurisdiction as to this defendant because as to it no diversity of citizenship is claimed and because it appears from the complaint, as amended, that [fol. 123] the case does not arise under a law of the United States, and more particularly that it does not arise under the Natural Gas Act, as is claimed in said complaint and amendment thereto.

Second Defense

The Court is without jurisdiction as to this defendant in that this action is one to obtain a declaratory judgment as to the rights and liabilities of the plaintiff Phillips Petroleum Company and this defendant under a contract for the purchase by plaintiff and sale by the defendant of certain gas, and jurisdiction of such an action exists only where the Court would have jurisdiction if the action were one brought for damages after breach or for specific performance or for some other method of enforcing the contract after breach; that if, it must appear that, apart from resort to the remedy of declaratory judgment, a federal court would have jurisdiction of the case. The jurisdiction of the court as fixed by the Constitution and laws cannot be extended by resort to this declaratory judgment procedural device. It affirmatively appears from the complaint,

as amended; that jurisdiction of the action would not exist if it were one brought for damages after breach or for specific performance or for other method of enforcing the contract after breach; and the Court is therefore without jurisdiction of this action brought to obtain a declaratory judgment.

Third Defense

It affirmatively appears from the complaint, as amended, that under the provisions of Section 51 of the Judicial Code, as amended, the venue of the action as to this defendant has been improperly placed and that jurisdiction over the person of this defendant is lacking, and that the said action has been brought in the wrong district and service of the summons was not authorized and did not confer jurisdiction over the person of this defendant.

Fourth Defense

The complaint fails to state a claim against this defendant upon which relief can be granted.

[fol. 124]

Fifth Defense

This defendant denies the allegations of Paragraph 1 of the complaint, as amended, to the effect that jurisdiction attaches herein because of the existence of a federal question. This defendant denies that the action arises under the Natural Gas Act (52 Stats. 821, et seq.; 15 U.S.C.A. 1717, et seq.), as is claimed in Section 1 of the complaint. Defendant admits that the amount in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00); and this defendant denies all the other allegations made in Section 1 of the complaint.

This defendant admits the allegations contained in Section or Paragraph 2 of the complaint.

Sixth Defense

This defendant denies the allegations contained in Section 3 of the complaint, to the effect that there is a controversy now existing between the plaintiff and the three defendants arising out of the same transaction or occurrence and involving a question common to all the parties hereto.

Seventh Defense

Defendant admits that it was recited in the contract between plaintiff Phillips Petroleum Company and this defendant that the Michigan-Wisconsin Pipe Line Company was desirous of obtaining from the Federal Power Commission a certificate of public convenience and necessity for the construction and operation of a pipe line system from a point in the State of Texas to points in the States of Michigan and Wisconsin. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in Paragraph 4 of the complaint.

Eighth Defense

This defendant admits the making of the contract between plaintiff and this defendant, referred to in Section 5 of the complaint, copy of which is attached to the complaint. It admits that the contract between it and the plaintiff Phillips Petroleum Company is correctly set forth [fol. 125] in the exhibit attached to plaintiff's petition. As to the other allegations contained in Section 5, it is without knowledge or information sufficient to form a belief as to the truth of said allegations.

Ninth Defense

This defendant denies the allegations made in Paragraph 6 of the complaint, to the effect that it appears from the contract made by plaintiff and this defendant, dated December 5, 1945, that the Michigan-Wisconsin Pipe Line Company has an interest in said contract, and denies that such interest exists or ever existed. It denies the allegations of said section that on November 30, 1946, the Michigan-Wisconsin Pipe Line Company obtained from, and there was issued to it by, the Federal Power Commission a certificate of public convenience and necessity; and it alleges in this connection that no such certificate has ever been issued to the *Michigan-Wisconsin* Pipe Line Company. It is without sufficient information or knowledge to form a belief as to the truth of the other allegations contained in Paragraph 6.

Tenth Defense

This defendant admits that the contract between it and the plaintiff, dated December 5, 1945, contains in Section 2, Article II, the provisions correctly quoted in Section 7 of the complaint, and defendant pleads these provisions of the contract and the fact that a certificate of public convenience and necessity authorizing the construction and operation of the pipe line referred to was not issued to said Pipe Line Company prior to the receipt of said telegram of cancellation as a defense to this action. It denies all the allegations added to Section 7 of the complaint by the "Amendment to Complaint", except that defendant admits

(1) that it has contended and contends that the action, if any, of the Federal Power Commission on November 30, 1946, did not constitute the issuance of a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company;

(2) that it has contended and contends that notwith- [fol. 126] standing any action or purported action taken by the Federal Power Commission on November 30, 1946, this defendant had the right to terminate said contract between this defendant and Phillips Petroleum Company of date December 5, 1945; and

(3) that the parts of Sections 717n (b), 717o, and 717f (e) of the Natural Gas Act quoted in the amendment to Paragraph 7 of the complaint are substantially accurate quotations.

(4) By way of further answer to Section 7 of the complaint, as amended, defendant says that it is without knowledge or information sufficient to form a belief as to whether the Commission dispatched the telegram purportedly dated November 30, 1946, quoted in the amendment to Section 7 of the complaint (page 2); that this defendant further alleges that if any such telegram was sent, then the Commission erred in stating that it had already adopted an "opinion and order" in Docket No. G-669, issuing certificate, with conditions, to Michigan-Wisconsin Pipe Line Company. That in fact no such opinion and order were prepared or filed on that date and that no opinion of any character dealing with said subject matter was adopted or filed until after said cancellation telegram was for-

warded to and received by the plaintiff Phillips Petroleum Company. If any opinion was ever filed by the Commission dealing with such subject matter and dated November 30, 1946, then the same was erroneously dated and the same in fact was not adopted or filed on that date.

Eleventh Defense

This defendant denies the allegations made in the first sentence of Section 8 of the complaint.

It admits that it took the position, and still does, that no certificate of public convenience and necessity was so issued to Michigan-Wisconsin Pipe Line Company, as alleged in the first sentence of said section. It admits that on December 2, 1946, it forwarded to the plaintiff the telegram quoted in said section and that on the morning of December 3, 1946, it received a reply thereto similar to the telegram forwarded by plaintiff to Skelly and quoted [fol. 127] in said section. It admits the allegations contained in said section to the effect that it has asserted and now asserts and claims that no certificate of public convenience and necessity was secured by the Michigan-Wisconsin Pipe Line Company prior to the time its telegram of December 2, 1946, was forwarded to plaintiff Phillips Petroleum Company; and it admits that it claims that whatever actions and proceedings were taken by said Federal Power Commission on November 30, 1946, did not amount to the issuance by said Commission of a certificate of public convenience and necessity within the meaning of said contract of December 5, 1945; and it alleges that in fact no certificate of public convenience and necessity was issued by said Commission to the Michigan-Wisconsin on November 30, 1946, or at any other time prior to the plaintiff's receipt of this defendant's telegram terminating the contract of December 5, 1945.

Defendant denies that, prior to the receipt by plaintiff of defendant's cancellation telegram sent on December 2, 1946, a certificate of public convenience and necessity was issued by the Federal Power Commission to the Michigan-Wisconsin Pipe Line Company in accordance and in compliance with the requirements of the Natural Gas Act and the rules, regulations and procedure of said Commission and in accordance with the contract between the parties,

which provided that, to prevent resort to said termination provision of the contract of December 5, 1945, a certificate should be issued authorizing "the construction and operation of said pipe line" prior to December 2, 1946; and it alleges that no such certificate was so issued or has been issued.

Defendant denies all the other allegations contained in Section 8. It also denies all the allegations contained in Section 9 of said complaint, as amended.

Twelfth Defense

This defendant affirmatively alleges as a defense to this action that at the time it sent its telegram of cancellation heretofore referred to, the Federal Power Commission had not issued to Michigan-Wisconsin Pipe Line Company a [fol. 128] certificate of public convenience and necessity authorizing "the construction and operation" of the proposed pipe line and that therefore this defendant acted within its rights under the contract between the parties in sending the telegram of cancellation. Defendant further alleges that said Federal Power Commission has not yet issued such certificate of public convenience and necessity to the Michigan-Wisconsin Pipe Line Company.

Thirteenth Defense

This defendant alleges that the contract between the plaintiff Phillips Petroleum Company and this defendant contemplated and required that the certificate of public convenience and necessity issued to the Michigan-Wisconsin Pipe Line Company should be one that, when issued, would entitle said Pipe Line Company to begin immediately the construction of its proposed pipe line, to the end that the same might be operated, and did not contemplate a certificate of such character that the construction and subsequent operation of said pipe line might be indefinitely delayed with this defendant's gas reserves tied up in the meantime. And this defendant alleges that in fact no such certificate was issued prior to the receipt of its telegram, terminating the contract between it and the plaintiff Phillips Petroleum Company, and that no such certificate has since been issued.

Fourteenth Defense

This defendant alleges that the contract between plaintiff Phillips Petroleum Company and this defendant contemplated and required that the certificate of public convenience and necessity, if any, issued to the Michigan-Wisconsin Pipe Line Company prior to receipt by said Phillips Petroleum Company of defendant's said telegram of cancellation should be a final certificate, representing final administrative action of the Federal Power Commission with respect to the issuance of said certificate; and it alleges that in fact no such final certificate was issued prior to the receipt of its telegram terminating the contract between it and the plaintiff Phillips, and that no such final [fol. 129] certificate has since been issued, and that this defendant acted within its contract rights in terminating said contract and in giving notice to the Phillips Petroleum Company of such termination, and that the giving of such notice was effective to terminate the contract. Defendant in this connection alleges that on January 14, 1947, the Commission refused to entertain or consider the petition for rehearing filed in said proceeding by one of the parties thereto (Panhandle Eastern Pipe Line Company) upon the ground that said purported order of November 30, 1946, was not final and that the petition for rehearing was filed prematurely.

Fifteenth Defense

That if any purported certificate of public convenience and necessity was issued to the Michigan-Wisconsin Pipe Line Company on November 30, 1946, or at any other time, the same was issued subject to the performance by said Pipe Line Company of certain onerous conditions and was not such a certificate of public convenience and necessity as was contemplated and required by the terms and provisions of the contract between the plaintiff Phillips Petroleum Company and this defendant.

Sixteenth Defense

That if any purported certificate of public convenience and necessity was issued to said Pipe Line Company on November 30, 1946, or at any other time, the same was made expressly subject to the performance by said Pipe

Line Company of certain onerous conditions, as expressly appears from the order attached to the plaintiff's complaint, as amended, and said conditions had not been accepted and had not been performed at or before the time plaintiff received this defendant's telegram of termination, dated December 2, 1946; and that said conditions have not yet been performed; and that said certificate is therefore not in full force and effect and was not in full force and effect at the time said telegram of termination was forwarded and received. That it expressly appears from said purported order dated November 30, 1946, that the same was not to be in full force and effect, and that the construction [fol. 130] and operation of said pipe line was not to be authorized, until such conditions had been accepted and performed. That said contract did not contemplate or require that this defendant's gas should be tied up for an indefinite time awaiting possible acceptance and later performance of said conditions by Phillips Petroleum Company.

Seventeenth Defense

Defendant further alleges as a defense to this action that if any purported certificate of public convenience and necessity was issued to said Pipe Line Company on November 30, 1946, or at any other time, such certificate was in the nature of an option, under which the Michigan-Wisconsin Pipe Line Company might later acquire the right to construct and operate the said pipe line, upon acceptance and subsequent performance of the conditions outlined therein; that is, that the conditions imposed were in the nature of conditions precedent and that the right to construct and operate the pipe line was not to arise or to exist until said conditions had been performed. That said conditions have not been performed and had not been performed on or prior to December 1, 1946, and that therefore the right to construct and operate the said proposed pipe line under said certificate of public convenience and necessity did not arise and does not now exist.

Eighteenth Defense

That if any certificate of public convenience and necessity was issued or attempted to be issued on November 30, 1946, or at any other time, the order of issuance was and is void because of the failure of the Federal Power Com-

mission to make findings of basic and essential jurisdictional facts supporting its order. Insofar as said Commission may have found that the Michigan-Wisconsin Pipe Line Company was able and willing to do the acts and perform the services proposed by it, said statement is contrary to and inconsistent with the express findings made by the Commission.

[fol. 131] Nineteenth Defense

That on November 30, 1946, the Commission had in full force and effect a rule or regulation adopted on August 23, 1946, and effective as of September 11, 1946, providing the following in respect to the issuance of orders:

"Issuance of Orders. In computing any period of time involving the date of the issuance of an order by the Commission, the day of issuance of an order shall be the day the Office of the Secretary mails or delivers copies of the order (full text) to the parties or their attorneys of record, or makes such copies public, whichever be the earlier. The day of issuance of an order may or may not be the day of its adoption by the Commission. In any event, the Office of the Secretary shall clearly indicate on each order the date of its issuance;"

Twentieth Defense

The action, if any, taken by the Commission on and prior to November 30, 1946, in respect to the issuance of said purported certificate of public convenience and necessity has already been adjudicated not to amount to the final and effective issuance of a certificate of public convenience and necessity; and it has already been adjudicated that said purported certificate, if any, was not a final certificate and did not represent final administrative action on the part of the Commission at the time this defendant sent its telegram of cancellation. Such adjudication was made in the case of Panhandle Eastern Pipe Line Company v. Federal Power Commission, No. 9482, by the United States Court of Appeals for the District of Columbia on April 21, 1947, and petition for certiorari was subsequently denied by the Supreme Court of the United States. In this connection the defendant alleges that the Panhandle Eastern Pipe Line Company, a party to said proceeding, within thirty days after November 30, 1946 (the purported date of

said order), filed its petition for rehearing, as was permitted by the Commission's rules in respect to final orders, and that on January 14, 1947, the Commission denied said petition on the ground that said order purportedly dated November 30, 1946, was not final and that the petition for rehearing had been filed prematurely; and appeal [fol. 132] to the courts was then taken, with the result above stated.

Wherefore, this defendant prays:

(1) That, under rule 7(a) of the Rules of Civil Procedure, plaintiff be required to reply hereto in accordance with the rules applicable to answers;

(2) That on hearing, this suit be dismissed as to this defendant; and if denied that relief, then in the alternative that on hearing judgment of the Court be that plaintiff take nothing as to this defendant and that it go hence and recover its costs in this behalf expended.

Fellows & Fellows, Ray S. Fellows, Kennedy Building; Dan Moody, Charles L. Black, Attorneys for the Defendant, Stanolind Oil and Gas Company.

Of Counsel: Donald Campbell, L. A. Thompson.

[Certificate of Service Attached to Original.]
Filed November 28, 1947.

IN UNITED STATES DISTRICT COURT

ANSWER OF MAGNOLIA PETROLEUM COMPANY TO THE COMPLAINT, AS AMENDED—Filed November 26, 1947

Defendant Magnolia Petroleum Company, for answer to the complaint, as amended, says:

First Defense

The complaint, as amended, fails to state a claim against this defendant upon which relief can be granted.

Second Defense

It appears from the face of the complaint, as amended, that this suit as against this defendant is not one within [fol. 133] the jurisdiction of this Court under the provisions

of Section 24 of the Judicial Code, as amended (Section 41, Title 28, U. S. C. A.), or any other Act of Congress; because, while plaintiff Phillips Petroleum Company attempts to ground jurisdiction on diversity of citizenship and upon allegations that a federal question is involved, it affirmatively appears from plaintiff's pleading (1) that as between plaintiff and defendants the diversity of citizenship requisite to jurisdiction does not exist and (2) that the action is not one arising under the Constitution or laws of the United States; and, particularly, it affirmatively appears that the claim asserted by plaintiff does not arise under the Natural Gas Act (52 Stat. 821, as amended; Sections 717-717W, Title 15, U. S. C. A.).

Third Defense

Under the provisions of Section 51 of the Judicial Code, as amended (Section 112, Title 28, U. S. C. A.), the venue as to this defendant is improper and this Court lacks jurisdiction over the person of this defendant because the action is brought in the wrong district, and the service of summons was unauthorized and did not confer jurisdiction over the person of this defendant. In this connection this defendant alleges that the telegram which plaintiff Phillips Petroleum Company alleges was sent to it by this defendant on December 2, 1946, was sent from Dallas, Texas.

Fourth Defense

This Court is without jurisdiction over this defendant in this suit because the action is brought under the Declaratory Judgment Act (Judicial Code, Section 274d; Section 400, Title 28, U. S. C. A.), and jurisdiction could exist in this Court only if an action for damages for breach of the alleged contract of December 7, 1945, between plaintiff Phillips Petroleum Company and this defendant, or an action for specific performance, or some other form of action to enforce the contract after breach would be within the jurisdiction of this Court; and it affirmatively appears from the complaint, as amended, that this Court would not have jurisdiction of any such form of action on the claim that this defendant had breached said contract.

[fol. 134] Fifth Defense

This defendant admits the allegation of paragraph 1 of the complaint, as amended, to the effect that the value of

the matter in controversy in this suit, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000.00), and all of the allegations of paragraph 2; but denies all of the allegations of paragraph 1 of the original complaint and the amendment thereto, except the allegation as to the value of the matter in controversy.

Sixth Defense

This defendant denies the allegation of paragraph 3 of the complaint, as amended, to the effect that the alleged controversy, as to all defendants, arises out of the same transactio- or occurrence and involves a question common to all parties to the suit.

Seventh Defense

This defendant does not have sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint, as amended.

Eighth Defense

This defendant admits that on or about December 7, 1945, it entered into a contract whereby it agreed to sell to plaintiff Phillips Petroleum Company, and Phillips Petroleum Company agreed to purchase from this defendant, quantities of gas to be produced from certain lands situated in Sherman and Hansford Counties, Texas, and that the copy of said contract set forth as Exhibit B (pages 1 to 20) of Exhibit 1 to the complaint, as amended, is a correct copy of said contract; but as to all other allegations of said paragraph 5 of the complaint, as amended, this defendant does not have sufficient information or knowledge to form a belief as to the truth of such other allegations.

Ninth Defense

This defendant denies the allegations of paragraph 6 of the complaint, as amended, to the effect (1) that it appears from the alleged contract between plaintiff Phillips Petroleum Company and Michigan-Wisconsin Pipe Line [fol. 135] Company and from the contract of December 7, 1945, between this defendant and Phillips Petroleum Company, that Michigan-Wisconsin Pipe Line Company has an interest in said contract of December 7, 1945, and

(2) that Michigan-Wisconsin Pipe Line Company on November 30, 1946, obtained a certificate of public convenience and necessity from the Federal Power Commission in accord with the requirements of the Natural Gas Act and the rules, regulations and procedure of said Commission adopted and applied pursuant to said Act; and as to all other allegations of said paragraph 6 of the complaint, as amended, this defendant does not have sufficient information or knowledge to form a belief as to the truth of such other allegations of said paragraph.

Tenth Defense

This defendant admits that the provisions of Section 2 of Article II of the contract between it and Phillips Petroleum Company of December 7, 1945, are correctly quoted in paragraph 7 of the complaint; but this defendant denies all allegations which were added to said paragraph 7 of the original complaint by the amendment thereto, except this defendant admits (1) the allegations to the amendment to said paragraph 7 to the effect that this defendant contends that the alleged action of the Federal Power Commission on November 30, 1946, did not constitute the issuance of a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company and (2) the allegation to the effect that this defendant contends that it was entitled on December 2, 1946, to terminate the contract; and this defendant further admits that the parts of Sections 717n(b), 717o and 717f(e) set forth in said amendment to paragraph 7 are substantially correct quotations.

Eleventh Defense

As to paragraph 8 of the complaint, this defendant

(a) admits that it has taken the position that no certificate of public convenience and necessity was issued to Michigan-Wisconsin Pipe Line Company on, prior to, or subsequent to December 2, 1946; and it now pleads in bar of this suit the fact that no certificate of convenience and [fol. 136] necessity for the construction and operation of the pipe line was issued to Michigan-Wisconsin Pipe Line Company by the Federal Power Commission prior to the receipt by plaintiff Phillips Petroleum Company of this defendant's

telegraphic notice of termination of said contract of December 7, 1945;

(b) admits that on December 2, 1946, it sent a telegram to plaintiff Phillips Petroleum Company at Bartlesville, Oklahoma, in words and figures substantially as alleged in paragraph 8 of the complaint, as amended;

(c) admits that on December 3, 1946, it received from plaintiff Phillips Petroleum Company a telegram in substantially the same words and figures as the telegram pleaded in paragraph 8 of the complaint, as amended, as a copy of the telegram which plaintiff Phillips Petroleum Company there alleges that it sent to Skelly Oil Company;

(d) admits that it has asserted, and now asserts and claims, that no certificate of public convenience and necessity was secured by Michigan-Wisconsin Pipe Line Company from the Federal Power Commission prior to the receipt by plaintiff Phillips Petroleum Company of the telegram sent to it by this defendant on December 2, 1946;

(e) admits that it has asserted, and it now asserts and claims, that on December 2, 1946, it had the right to terminate, and did terminate, the contract between it and plaintiff Phillips Petroleum Company, of date December 7, 1945; and that it has asserted, and now asserts and claims, that it is no longer obligated by said contract;

(f) admits that it has claimed, and it now claims, that the "actions and proceedings of said Federal Power Commission of November 30, 1946, and prior to the notice by the defendants (this defendant) to this plaintiff (Phillips Petroleum Company) did not amount to the issuance by said Commission of a certificate of public convenience and necessity", and that it has refused "to recognize the actions of said Federal Power Commission on said date as being within the requirements of said Natural Gas Act pertaining to the issuance of certificates of public convenience and necessity"; and it says that in point of law and [fol. 137] fact no action of the Federal Power Commission prior to December 2, 1946, or to the delivery to plaintiff Phillips Petroleum Company of this defendant's telegraphic notice of termination of said contract of December 7, 1945, amounted to the issuance to said Pipe Line Company of a certificate of public convenience and necessity within the

contemplation of the contract of December 7, 1945, between it and plaintiff Phillips Petroleum Company pleaded in the complaint, and that it has refused to recognize any such alleged actions of the said Federal Power Commission on said date as amounting to the issuance of a certificate of public convenience and necessity with the meaning and terms of said contract between this defendant and Phillips Petroleum Company;

(g) denies that the Federal Power Commission on November 30, 1946, or at any other time prior to the notice of this defendant to plaintiff Phillips Petroleum Company of the termination of said contract of December 7, 1945, made any order granting the application of Michigan-Wisconsin Pipe Line Company for a certificate of public convenience and necessity, and further denies that such Commission prior to said time issued to said Pipe Line Company a certificate of public convenience and necessity and caused notice thereof to be given on said date;

(h) denies that prior to the receipt by plaintiff Phillips Petroleum Company of the telegram sent to it on December 2, 1946, by this defendant that "a certificate of public convenience and necessity was issued by said Federal Power Commission to plaintiff Pipe Line Company consonant with and in compliance with the requirements of the Natural Gas Act and with the rules, regulations and procedure of said Federal Power Commission under said Act and was a certificate of public convenience and necessity within the meaning of the Natural Gas Act and said" contract of December 7, 1945, between this defendant and Phillips Petroleum Company; and says that no certificate within the contemplation of said contract has ever been issued to said Pipe Line Company;

(i) denies that it has misconstrued or refused to recognize the provisions of said Natural Gas Act and the func-
[fol. 138] tions and actions of the Federal Power Commission acting under the terms of said Act; and

(j) denies that "if the Natural Gas Act, and the requirements thereof, be properly construed and applied and be given appropriate effect, the actions and proceedings of said Federal Power Commission prior to any notice to plaintiff Phillips by any of the defendants (this defendant) * * * did constitute the issuance to plaintiff pipe

line company by said Commission of a certificate of public convenience and necessity 'within the requirements of the Natural Gas Act' and as provided for in said contract" between this defendant and Phillips Petroleum Company of said December 7, 1945; or that any action taken by the Federal Power Commission has the effect "to preclude any right on the part of" this defendant to terminate said contract.

As to all other allegations of paragraph 8 of the complaint, as amended, which are neither admitted or denied above, this defendant says that it is without sufficient knowledge or information to form a belief as to the truth of such other allegations.

Twelfth Defense

In connection with the foregoing admissions and denials of matters alleged in paragraph 8 of the complaint, as amended, this defendant affirmatively pleads that the Federal Power Commission had not, prior to the receipt by plaintiff Phillips Petroleum Company of the telegram sent to it by this defendant on December 2, 1946, issued, and that it has not at any time since said date issued, to Michigan-Wisconsin Pipe Line Company a certificate of public convenience and necessity within the meaning of the provisions of Section 2 of Article II of the contract between this defendant and plaintiff Phillips Petroleum Company of date December 7, 1945, and that on December 2, 1946, this defendant had the right to terminate, and did terminate, said contract.

Thirteenth Defense

This defendant denies the allegations of paragraph 9 of the complaint, as amended.

[fol. 139] Fourteenth Defense

This defendant alleges that the contract of date December 7, 1945, between plaintiff Phillips Petroleum Company and this defendant contemplated and required that on or before December 1, 1946, a certificate of public convenience and necessity be obtained by, or issued to Michigan-Wisconsin Pipe Line Company as a presently and effective certificate, representing final administrative action by the Fed-

eral Power Commission with respect to same, authorizing said Pipe Line Company to presently and immediately begin the construction and operation of a pipe line for the transportation of gas in interstate commerce, or this defendant would have the right to terminate said contract of December 7, 1945, between it and plaintiff Phillips Petroleum Company by telegraphic notice delivered to Phillips Petroleum Company at any time after December 1, 1946, but before the issuance of any such certificate; that, in fact, no such certificate was issued prior to the receipt by plaintiff Phillips Petroleum Company of the telegram sent by this defendant to plaintiff Phillips Petroleum Company on December 2, 1946, notifying it of the termination of said contract of December 7, 1945; that no such final certificate has since been issued, and that this defendant acted within its contractual rights in notifying plaintiff Phillips Petroleum Company of the termination of said contract, and said notice was effective to terminate said contract.

Fifteenth Defense

If any action was taken by the Federal Power Commission on November 30, 1946, or prior to December 2, 1946, or at any other time, toward issuing to Michigan-Wisconsin Pipe Line Company a certificate of public convenience and necessity, or purporting to issue such a certificate, such action of the Commission did not authorize said Pipe Line Company to construct or begin the construction of a pipe line or to operate a pipe line, and any such action did not amount to the issuance of a certificate of public convenience and necessity to said Pipe Line Company within the terms and provisions of Section 2 of Article II of said contract of date December 7, 1945, between this defendant and plaintiff [fol. 140] Phillips Petroleum Company; but whatever action, if any, was then taken or has been taken by the Federal Power Commission toward issuing a certificate of public convenience and necessity to said Pipe Line Company, or purporting to issue such a certificate, was not final and amounted to a conditional order which imposed upon said Pipe Line Company burdensome and onerous conditions to be complied with and performed by said Pipe Line Company before it was, or could or would be, authorized lawfully to begin the construction or commence the operation of an interstate pipe line.

Sixteenth Defense

It expressly appears from the copy of the order attached as an exhibit to the amendment to the complaint, and alleged or claimed by plaintiff Phillips Petroleum Company to be or amount to the issuance of a certificate of public convenience and necessity to said Pipe Line Company, that various and sundry conditions are there provided to be complied with or performed by said Pipe Line Company before said Pipe Line Company can claim any right thereunder to construct or operate an interstate pipe line for the transportation of gas or become the holder of a certificate of public convenience and necessity for such purpose; and it is not made to appear that said conditions have been accepted by Michigan-Wisconsin Pipe Line Company or that any of them had been performed or complied with at or before the receipt by plaintiff Phillips Petroleum Company of this defendant's telegram of December 2, 1946, terminating said contract of December 7, 1945. This defendant alleges that even now said conditions have not been accepted or complied with or performed by Michigan-Wisconsin Pipe Line Company; that said action of the Federal Power Commission did not result, and has not resulted, in the issuance of a certificate effective to authorize the construction and operation of a pipe line for the transportation of gas in interstate commerce; and whatever the Federal Power Commission did on and prior to December 2, 1946, did not amount to the issuance of a certificate of public convenience and necessity within the terms of said contract between this defendant and plaintiff Phillips Petroleum [fol. 141] Company barring this defendant from terminating said contract on December 2, 1946, by notice to plaintiff Phillips Petroleum Company.

Seventeenth Defense

If any purported certificate of public convenience and necessity was issued or attempted to be issued to Michigan-Wisconsin Pipe Line Company on November 30, 1946, or at any other time, the order of issuance was and is void because of the failure of the Federal Power Commission to make the basic and essential findings on which the order rests. In so far as the Federal Power Commission may have stated that Michigan-Wisconsin Pipe Line Company "is able and willing properly to do the acts and perform

the services proposed" by it, said statement is contrary to express findings made by the Commission.

Eighteenth Defense

This defendant is without knowledge or information sufficient to form a belief as to whether or not the Commission dispatched the telegram purportedly dated November 30, 1946, quoted in the amendment to paragraph 7 of the complaint; and this defendant further alleges that if any such telegram was sent, then the Commission erred in stating therein that the Commission had adopted an opinion and order issuing a certificate to Michigan-Wisconsin Pipe Line Company, for in fact no such opinion was written, promulgated or filed on that date dealing with the subject-matter of the application of said Pipe Line Company, and no opinion on said application was adopted or filed prior to the time said telegram of cancellation was forwarded to and received by plaintiff Phillips Petroleum Company; and if any opinion on the subject of said application or purporting to find facts as a basis for the issuance of a certificate thereon bears date of November 30, 1946, then the same was incorrectly and erroneously so dated, for it was not made, adopted or filed on that date.

Nineteenth Defense

That on November 30, 1946, the rules of the Federal Power Commission with respect to the date an order of the [fol. 142] Commission would be deemed to have been issued were as follows:

"Issuance of Orders. In computing any period of time involving the date of the issuance of an order by the Commission, the day of issuance of an order shall be the day the Office of the Secretary mails or delivers copies of the order (full text) to the parties or their attorneys of record, or makes such copies public, whichever by the earlier. The day of issuance of any order may or may not be the day of its adoption by the Commission. In any event, the Office of the Secretary shall clearly indicate on each order the date of its issuance;"

That it was the rule, practice and policy of the Commission to apply said rule in matters relating to such applications as that of Michigan-Wisconsin Pipe Line Company; and

nder said rule, practice and policy no order was made on aid application and no certificate was issued to Michigan-Wisconsin Pipe Line Company on November 30, 1946, and no findings were made or opinion adopted on said date, or prior to this defendant's said notice of cancellation and receipt thereof by plaintiff Phillips Petroleum Company.

Twentieth Defense

This defendant was not a party to any proceedings before the Federal Power Commission having to do with any application for, or attempt by Michigan-Wisconsin Pipe Line Company to secure, a certificate of public convenience and necessity; and the action which plaintiff alleges was taken by the Commission on November 30, 1946, on the application of Michigan-Wisconsin Pipe Line Company for a certificate of public convenience and necessity has been ruled by said Commission not to be a final action of the Commission on said application; and such action has been finally adjudged by the United States Court of Appeals for the District of Columbia, and writ of certiorari denied thereon by the Supreme Court, in Panhandle Eastern Pipe Line Company vs. Federal Power Commission, not to be a final, effective, appealable order issuing a certificate of public convenience and necessity.

Wherefore, this defendant prays:

[fol. 143] (1) that, under Rule 7(a) of the Rules of Civil Procedure, plaintiff Phillips Petroleum Company be ordered to file an answer hereto;

(2) that on hearing this suit be dismissed as to it; and, if denied that relief, then in the alternative,

(3) that on hearing, judgment of the Court be that plaintiff take nothing as to this defendant and that it go hence and recover its costs in this behalf expended.

Walace Hawkins, Earl A. Brown, Raymond Myers, W. R. Wallace, Dan Moody, Attorneys for Defendant, Magnolia Petroleum Company.

[Certificate of Service Attached to Original.]
Filed November 26, 1947.

ORDER TO FILE REQUESTED FINDINGS AND CONCLUSIONS—May 26, 1948

This cause came on to be further heard on this 16th day of April, 1948, and was argued by counsel. Thereupon, it was

Ordered By The Court that counsel for plaintiff file their requested findings and conclusions with the Clerk of this Court not later than seven days from the date hereof, and that counsel for defendants file their requested findings and conclusions with the clerk within ten days from the date hereof; and that all such findings and conclusions, when so filed with the clerk, shall be and become parts of the proceedings in this cause.

Done as of the date first aforesaid.

Royce H. Savage, Judge.

Filed May 26, 1948.

[fol. 144] IN UNITED STATES DISTRICT COURT

DEFENDANTS' REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed April 28, 1948

The defendants, Skelly Oil Company, Stanolind Oil and Gas Company and Magnolia Petroleum Company, come now and respectfully request the Court to make and adopt the following findings of fact and conclusions of law thereon:

FINDINGS OF FACT

Plaintiff will be referred to herein as Phillips. Defendant Skelly Oil Company will sometimes be referred to herein as Skelly; Stanolind Oil and Gas Company as Stanolind; and Magnolia Petroleum Company as Magnolia. Michigan-Wisconsin Pipe Line Company as Michigan-Wisconsin.

I

On December 5, 1945, Phillips and Stanolind entered into a written long-term sales contract, under which Stanolind agreed to sell and Phillips agreed to buy a large amount of gas to be produced from approximately 118,000 acres of land located in Dallam, Sherman and Hansford Counties, Texas, and in Texas County, Oklahoma, and comprising a part of the so-called Hugoton Gas Field. On the same

date Phillips entered into a similar sales contract with Skelly, covering approximately 46,528 acres of land in Sherman and Hansford Counties, Texas, in the same gas field; and on the 7th day of December, 1945, Phillips entered into a similar sales contract with Magnolia, covering approximately 25,000 acres of land in Sherman and Hansford Counties, Texas, in a part of the same field. Correct copies of each of said contracts are parts of "Exhibit 1" attached to plaintiff's original complaint filed in this action.

The said contract between Magnolia and Phillips was executed in duplicate by Magnolia in Dallas, Texas, and returned to Bartlesville, Oklahoma, by an agent of Phillips and executed by Phillips in Bartlesville, and one of the executed duplicates of it was returned by Phillips by mail to Magnolia in Dallas.

[fol. 145] II

(a) The terms and provisions of said three contracts are similar except that the provisions therein with respect to the sale of gas from the properties covered thereby to persons other than Phillips prior to the commencement of deliveries of gas by Phillips to Michigan-Wisconsin are different, and except that under their respective contracts the sale and delivery of gas to Phillips by Magnolia and Skelly were to be made only in the State of Texas, in which all the leases of said two companies covered by their contracts were located.

(b) Each of said contracts recited that Michigan-Wisconsin Pipe Line Company "desires to obtain from the Federal Power Commission a certificate of public convenience and necessity under the requirements of the Natural Gas Act for" its proposed pipe line system.

(c) Each of said contracts contained in its preamble a representation, among other things, that Phillips was in the process of negotiating a contract with Michigan-Wisconsin pursuant to which Phillips would be obligated to make available to Michigan-Wisconsin reserves of natural gas in and under leases in the Hugoton Gas Field belonging to Phillips and others with whom Phillips may enter into contracts for the purchase of gas, and therein Michigan-Wisconsin would agree to purchase from Phillips

its requirements of gas for its proposed project. Said contract was executed on December 11, 1945.

(d) Each of said contracts between Phillips and the defendants contains, among others, the following recitation:

"It is proposed that the said contract, hereinafter referred to as the 'pipe line contract', in which Phillips Petroleum Company is designated as 'Seller' and Michigan-Wisconsin Pipe Line Company is designated as 'Buyer', will contain, among others, the following provisions:

'* * * Upon the happening of any one of the following contingencies, to wit:

(a) The failure of Buyer to procure from the Federal Power Commission, on or before September 1, 1946, a Cer- [fol. 146] tificate of Public Convenience and Necessity for the construction and operation of the Pipe Line, or

(b) The issuance by the Federal Power Commission of an order refusing to grant a Certificate of Public Convenience and Necessity for the Pipe Line, or

(c) The failure of Buyer to commence the actual construction of the Pipe Line on or before March 1, 1947, or

(d) The failure of Buyer to commence on or before January 1, 1948, the acceptance of deliveries of gas hereunder for delivery by Buyer for resale in one or more municipalities east of the Missouri River,

Seller shall have the right to terminate this contract by written notice to be delivered to Buyer not later than thirty (30) days after the happening of such contingency.' "

Said provisions were contained in the contract of December 11, 1945 between Phillips and Michigan-Wisconsin.

(e) Each of said three contracts with the defendants contains, in Section 2 of Article II, the following termination provision:

"Section 2. If the proposed contract between Buyer and Michigan-Wisconsin Pipe Line Company is not consummated on or before the first day of January, 1946, or if said contract is consummated and thereafter terminated upon the happening of one of the four contingencies hereinbefore quoted from said proposed contract, then and in

either of those events either party shall have the right to terminate this contract by written notice to be delivered to the other party within thirty (30) days after the said first day of January, 1946, in case the said pipe line contract is not consummated, or within thirty (30) days after the termination of the pipe line contract as aforesaid; provided, however, that, in the event this contract shall not be terminated for any of the foregoing reasons on or before October 1, 1946, and in the event Michigan-Wisconsin Pipe Line Company shall fail to secure from the Federal Power Commission on or before that date a certificate of public convenience and necessity for the construction and operation of its pipe line, Seller shall have the right to terminate [fol. 147] this contract by written notice to Buyer delivered to Buyer at any time after December 1, 1946, but before the issuance of such certificate. Immediately upon the occurrence of any of the events or contingencies hereinbefore mentioned in this Section 2 or in the event of the termination by Buyer herein of its contract with Michigan-Wisconsin Pipe Line Company, Buyer herein shall give Seller herein notice thereof by telegram, to be confirmed by letter."

III

The hereinabove referred to provisions of the contracts between the defendants and the plaintiff contemplated and the parties thereto intended:

(a) That Michigan-Wisconsin Pipe Line Company should proceed with diligence in an endeavor to procure from the Federal Power Commission a certificate of public convenience and necessity, issued under and in accordance with the requirements of the provisions of the Natural Gas Act, authorizing the construction and operation of its proposed pipe line; and,

(b) That said certificate should be a final and effective one, under and pursuant to which Michigan-Wisconsin, promptly upon its issuance, could proceed to acquire its facilities and proceed with the construction of its proposed pipe line, to be followed promptly with the operation thereof; and,

(c) That in the event a certificate of the kind and character stated in (a) and (b) above should not be procured

on or before September 1, 1946, and in the event that Phillips should not terminate the pipe line contract by reason thereof under the termination provisions of said contract that are recited in the contracts with the defendants, and in the event also that such a certificate was not secured on or before October 1, 1946, then the defendants, respectively, should have the right to terminate their contracts at any time after December 1, 1946, but prior to the issuance of a certificate of said kind and character.

IV

On December 2, 1946, each of the defendants delivered to [fol. 148] Phillips its written notice declaring that it had terminated, and declaring that it did thereby terminate, its contract with Phillips. This was done by telegram sent to Phillips on said date, which telegrams are copied in plaintiff's original complaint. They were all received by Phillips prior to 5:15 P. M. C.S.T. that day; the Stanolind telegram at 9:45 A. M.; the Magnolia telegram at 1:00 P. M.; the Skelly telegram at 5:09 P. M., C.S.T.

V

Michigan-Wisconsin had previously and on September 24, 1945, filed its application for a certificate of public convenience and necessity authorizing it to construct and operate an interstate gas pipe line from said Hugoton Gas Field in Texas to points in the States of Wisconsin and Michigan, which application the Commission docketed as Docket No. G-669. It later filed several amended applications in the same proceeding. Neither in said application nor in any of said amended applications did Michigan-Wisconsin offer to accept a certificate subject to the conditions hereinafter mentioned, or any of them. No mention was therein made of any of said conditions. It therein sought authority to serve, among others, markets in the Detroit and Ann Arbor areas in Michigan, including the entire markets in said areas upon the expiration on December 31, 1951, of Panhandle Eastern's contracts with Michigan Consolidated.

VI

Panhandle Eastern Pipe Line Company, hereinafter referred to as Panhandle Eastern, intervened in said pro-

ceeding and moved to dismiss the Michigan-Wisconsin application on the ground, among others, that Panhandle Eastern under certificates held by it had a prior right to serve and to continue to serve even after December 31, 1951, the Detroit and Ann Arbor markets in the State of Michigan. Other intervenors also moved to dismiss the application.

VII

The Federal Power Commission conducted a number of hearings at which evidence was received in Docket G-669 [fol. 149] and other dockets that had been consolidated with it, the first starting April 16 and ending May 3, 1946, another for three days in the latter part of May 1946, and thereafter it was in almost continuous session receiving evidence and conducting hearings from August 6, 1946 through November 13, 1946, and oral arguments were heard commencing on November 20 and ending November 23, 1946. (See, Opinion No. 147, plaintiff's Ex. 22).

VIII

(1) On November 30, 1946 (Saturday), the Commission was in executive session considering what action it should take in respect of the following three matters:

(a) The motions of Panhandle Eastern and others (in Docket G-669) to dismiss the application of Michigan-Wisconsin for a certificate of public convenience and necessity;

(b) The said application of Michigan-Wisconsin for said certificate; and

(c) The application of Panhandle Eastern (in Docket G-706, which had been consolidated with G-669), for a certificate of public convenience and necessity.

(2) As members of the Commission (three concurring and two dissenting) came into agreement on the wording of the various parts of a draft form of an order on the application of Michigan-Wisconsin, Mr. Fuquay, as Secretary of the Commission, noted the wording on a draft copy in his hands; and that draft, with the changes, modifications and interlineations therein made by him, were the "notes" or "master draft" from which the order of November 30, 1946, in question in this suit, was prepared by Mr. Fuquay on December 2, 1946. While the so-called

master draft, according to Mr. Fuquay's testimony, contained the language of the said order as agreed upon by the majority of the Commission late on the day of November 30th, it was not, according to his testimony, "the official copy" of said order; it was not signed, sealed or authenticated by the Secretary or any member of the Commission.

[fol. 150] IX

After the adjournment of said executive session on November 30, 1946, the Secretary, Mr. Fuquay, sent the following telegram to the parties to said proceedings:

"Commission today adopted findings and order, denying motion of Panhandle Eastern Pipe Line Company to dismiss application of Michigan-Wisconsin Pipe Line Company in Docket No. G-669. Commission adopted findings and order in Docket No. G-706, issuing certificate of convenience and necessity to Panhandle Eastern Pipe Line Company. Commission adopted opinion and order in Docket No. G-669, issuing certificate, with conditions, to Michigan-Wisconsin Pipe Line Company. Supporting and dissenting opinions in last named docket will be available at early date. All orders available afternoon December 2."

None of the defendants herein was a party to said proceedings and none of them received a copy of said telegram.

Nothing further was done with reference to the order bearing date of November 30, 1946, here in question, until on December 2, 1946.

X

Although said telegram stated that the Commission adopted an opinion in Docket G-669, it is established by the undisputed evidence that the first opinion which the Commission adopted in said proceeding was Opinion No. 147 of the majority of the members of the Commission dated January 17, 1947, but not issued until on February 7, 1947.

XI

On December 2, 1946, the said master draft of the said order was mimeographed by the Office of the Secretary and mimeographed copies of it first became available to the parties to said proceeding and to the public not earlier

than 6:15 P. M. E.S.T. on December 2, 1946, at which time attorneys for Michigan-Wisconsin and Panhandle Eastern and other persons received mimeographed copies thereof. Registered letters written by the Secretary of the Commission enclosing copies of the order and addressed to [fol. 151] Michigan-Wisconsin, Panhandle Eastern and Michigan Gas Storage Company, respectively, were delivered to a post office messenger at the Commission's office at 8:45 P. M. E.S.T. on December 2, 1946, and such letters arrived at the post office in Washington at 9:45 P. M. E.S.T. that day. At the same time the Secretary's office mailed other copies of the order by unregistered mail to the other parties to the proceeding.

XII

After said mimeographing of said order dated November 30, 1946, one copy thereof was executed by the Secretary of the Commission and the seal of the Commission impressed thereon, and it was made a part of the minutes of the November 30 proceedings of the Commission, which were subsequently prepared by the Secretary. Said Secretary testified in his disposition that said copy of said order (plaintiff's Ex. 5), so executed, is the "official copy" of the order of November 30, 1946, and the Court finds that it was and is such official copy.

XIII

Said order does not bear any notation of a "date of issuance". Each of two other orders of the Commission, dated November 30, 1946 (in Dockets G-669 and G-706), bears a notation of the date of its issuance, to-wit, December 2, 1946, this being in accordance with Rule 13(b) of the Commission's Rules of Practice and Procedure effective September 11, 1946.

XIV

Volume V of the printed and duly published reports of the Federal Power Commission shows that said order here in question dated November 30, 1946, contains no notation of a "date of issuance," and that it is the only order promulgated by the Commission between September 11, 1946, and January 2, 1947, that did not bear a notation of its

"date of issuance". Said Report also shows that in most instances the "date of issuance" was subsequent in point of time to the date of the order. In a few instances the two dates were the same.

[fol. 152]

XV

The Court finds as a fact that said order of November 30 here in question was not issued on Saturday, November 30, nor on Monday, December 2, 1946, nor prior to the issuance of the supplemental order on March 12, 1947, if then.

XVI

In another order of the Commission dated November 30, 1946, (a part of plaintiff's Ex. 6), the Commission denied the motion of Panhandle Eastern and others to dismiss the application of Michigan-Wisconsin. Therein, the Commission made four findings including a finding that the fact that Panhandle Eastern held certificates from the Commission authorizing it to transport to and sell gas in the Detroit and Ann Arbor markets did not of itself preclude the Commission "upon a proper showing" from authorizing another company to do the same thing and that for the Commission "to determine whether or not such a proper showing can be made" requires an opportunity for hearing and appropriate proceedings thereon, that is, a future hearing. That hearing was provided for in condition (viii) in paragraph (B) of the November 30 order, here in question.

XVII

On December 14, 1946, the Commission adopted an order issued December 16, 1946 (plaintiff's Ex. 15), in which it amended condition (viii) contained in the order dated November 30 here in question by changing the words "fifteen days" to "thirty days" thus extending the time for the date of issuance of the supplemental order which said condition provided should be issued.

XVIII

On December 30, 1946, the Commission adopted another order in Docket G-669 (plaintiff's Ex. 19), which supplemented its order dated November 30 here in question by adding thereto eight additional findings and ordering that they

be added to the order here in question as findings numbered (9) through (17) thereof. Also, in said order of December 30 the Commission ordered that the proceedings in Docket G-669 "be and it is hereby reopened," limited [fol. 153] however, to the receipt of further evidence with respect to condition (viii) of the order here in question.

XIX

On December 27, 1946, Panhandle Eastern filed in said proceeding (Docket G-669) an application for vacation of said order dated November 30, 1946 here in question, or, in the alternative, for a rehearing of said order. On December 30, 1946, similar applications were filed by other interveners. All of these applications were denied by the Commission by an order dated January 14, 1947, issued January 15, 1947, on the ground that the same were prematurely filed, and particularly because the Commission had provided in paragraph (C) of said order dated November 30, 1946, that, for the purpose of computing the time within which an application for rehearing may be filed, "the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later". In said order the Commission also stated that neither the opinions nor the supplemental order had been issued and that, accordingly, said applications for reconsideration or rehearing were premature, and the same were, for that reason, denied, without prejudice to the filing of other applications for rehearing within thirty days after the issuance of the opinions and the supplemental order.

XX

(a) Panhandle Eastern, acting under Section 19, (Section 717(r), Title 15, U.S.C.A.) of the Natural Gas Act, filed in the United States Court of Appeals for the District of Columbia, its petition for review of said order dated November 30, 1946, here in question, as well as said order of January 14, 1947. The said Court of Appeals, under date of April 21, 1947, made and entered an order of dismissal of said petition for review, the relevant portions of which are as follows:

"This cause coming on for consideration on the petition to review orders of respondent dated November 30, 1946,

December 14, 1946, December 30, 1946, January 3, 1947, and January 14, 1947, in the above entitled case, and on [fol. 154] respondent's motion to extend time to file the transcript of record, and on motion of National Coal Association and the United Mine Workers of America for leave to intervene and for other relief, and the court being of opinion that the order of November 30, 1946, was not a final order because it required for completion the issuance of a supplemental order or orders, and the other orders above mentioned not being final and not having made final said order of November 30, 1946, it is now, therefore,

"Ordered by the court, that the petition for review herein be, and it is hereby, dismissed, without prejudice, however, to the right of petitioner to petition for review of the order of November 30, 1946, after it shall have become final by the issuance of a supplemental order or orders making same final; * * *".

(b) Certiorari was applied for in the Supreme Court of the United States and was denied under date of October 13, 1947.

(c) In its brief filed in the Supreme Court of the United States, the Commission took the position that said order of November 30, 1946, was not a final or complete order because a supplemental order was needed "to complete the administrative action".

XXI

(a) On February 20, 1947 the Commission, by vote of a majority, adopted the Supplemental Opinion No. 147-A concerning the matters dealt with in condition (viii) in the order of November 30, 1946 here in question, and on the same date adopted the Supplemental Order pursuant to the reopening of the case and the rehearing conducted relating to the subject matter of condition (viii) contained in said order of November 30, 1946, and said Supplemental Opinion and Supplemental Order were issued in March 12, 1947.

(b) In footnote 1 appended to said Supplemental Opinion No. 147-A, dated February 20, 1947, the majority of the Commission, among other things, stated:

". . . As stated in our order of January 14, 1947, Pan- [fol. 155] handle's applications for rehearing were filed pre-

maturely in that they were filed in advance of the issuance of the opinions referred to above and the supplemental order herein. . . . The issuance of our supplemental opinion and order herein, completes the action contemplated in paragraph (C) of the November 30, 1946 order. . . . . "

XXII

Said order dated November 30, 1946 here in question states that "A certificate . . . be and it is hereby issued . . . upon the terms and conditions of this order". It also states in subparagraph (B) thereof that "This certificate is granted to applicant upon the following terms and conditions", which statement is followed by the setting forth of twelve separately numbered and stated conditions. Condition (xii) states that "This certificate is subject to the conditions herein specified, . . ."

XXIII

Said order dated November 30, 1946 contained the following condition:

"(ix) Applicant shall, within fifteen days after the issuance of the supplemental order herein, notify the Commission in writing whether the certificate as herein issued is acceptable to it."

Michigan-Wisconsin filed with the Commission on January 14, 1947 a letter dated January 13, 1947, stating that "said certificate is acceptable to the company."

XXIV

It was not until on November 13, 1947 that the Commission adopted an order, issued November 14, 1947, (plaintiff's Ex. 29) relating to the matters dealt with in conditions (v) and (vi) in said order dated November 30, 1946, which conditions prohibited the use of the authorized facilities unless Austin Field Pipe Line Company applied for and obtained a certificate from the Commission relating to certain facilities to be constructed connecting the Austin Storage Field with the Detroit and Ann Arbor areas, (a distance of 140 miles,) and until Michigan Consolidated did likewise with reference to certain other facilities in and about the Austin [fol. 156] and Reed City Storage Fields and also until the latter sought and obtained authority from the Commission

to operate the facilities which the Austin Field Company should seek authority to construct. However, the certificates granted by said order adopted November 13, 1947 did not authorize all of the facilities for which said conditions required said companies to make application, nor did it authorize either of said two companies or Michigan-Wisconsin to transport the gas of Michigan-Wisconsin from said storage fields to the Detroit and Ann Arbor areas.

XXV

(a) Condition (iii) in said order of November 30, 1946 was:

"(iii) Applicant shall obtain approval of its proposed plan of financings by the Securities and Exchange Commission, and the grant of the certificate herein authorized shall be without prejudice to any action which may be taken by that Commission."

(b) The Federal Power Commission did not have on November 30, 1946 either a commitment or an assurance from the Securities and Exchange Commission that the latter would approve the plan of financing of Michigan-Wisconsin, and it did not find that such approval would be given. This is disclosed by its finding (4) in its order dated November 30, 1946, and its Opinion adopted January 17, 1947. In finding (4) of said order the Commission found that such approval had not yet been obtained, that it was necessary, and that the authorization granted should be upon the express condition that such necessary approval be obtained because without it the project could neither be financed, constructed, nor operated. The majority of the Commission in Opinion No. 147 of January 17, 1947 found that the financing involved the raising of approximately $85,569,573.00. Said opinion discloses that the applicant was a newly formed subsidiary of American Li[illegible]t and Traction Company and that it was possessed of whatever it had not expended in organizing itself and in prosecuting its application in Docket G-669 of the $315,000 raised at the beginning of its existence; and that securities were proposed [fol. 157] to be issued and sold to raise said large sum of money. The Commission also therein stated that Michigan-Wisconsin and Michigan Consolidated were both subsidiaries of American Light and Traction Company, and

that "Applicant did not submit firm proof with respect to the purchase of" any of the securities which it proposed to issue to finance its project. It also therein stated that it, the Commission, was aware of the status of applicant's corporate affiliations as well as the "practical impossibility of its securing firm commitments of full financial authorization at this time, . . ." It therein quoted and relied on a statement by Michigan-Wisconsin that American Light and Traction Company was a regulated holding company and that the proposed financing was subject to the requirements of the Securities and Exchange Commission prescribed under the Public Utility Holding Company Act. It was also therein found that the usual pattern of financing ordinarily presented by applicants before it could not be followed by this applicant. In concluding its opinion on this subject, it said, among other things:

"In view of these circumstances, it is not necessary that Applicant at this time submit firm proof of its ability to finance the proposed project."

(c) The Court further finds from Plaintiff's Exhibits 51 and 52 that it was not until June 26, 1947 that a plan of financing Michigan-Wisconsin's proposed project was presented to the Securities and Exchange Commission. On that date American Light and Traction Company, the parent of Michigan-Wisconsin, submitted to the Securities and Exchange Commission a plan for such financing which contemplated the acquisition by American of common stock of Michigan-Wisconsin and the issuance by Michigan-Wisconsin of certain additional securities and preferred stock senior to said common stock. After hearing, the Securities and Exchange Commission, by an interim order dated November 19, 1947 authorized the sale by Michigan-Wisconsin to American of a portion of its common stock for $4,000,000, and by a subsequent order dated December 30, 1947 it approved said plan only to the extent of authorizing the issuance by Michigan-Wisconsin and the purchase by American [fol. 158] of shares of such common stock for an aggregate price of $25,000,000 (or $21,000,000 additional) for the purpose of financing the initial phase of the construction of said pipe line, said Commission finding that the entire project would cost approximately $104,500,000. The Securities and Exchange Commission at the same time provided that any

further financing of said project should be submitted to it by additional applications for its consideration.

XXVII

The construction of its proposed pipe line was not commenced by Michigan-Wisconsin until on December 10, 1947.

XVII

(a) Condition (ii) in said order dated November 30, 1946 was:

"(ii) That there shall be no transportation or sales of natural gas, subject to the jurisdiction of the Commission, by means of the facilities herein authorized until all necessary authorizations shall have been obtained from the State of Wisconsin and each of the communities proposed to be served in said state, as specified in the application, as amended, to the extent and in the manner required by Sections 196.49(4a) and 196.58(b) of Chapter 48 of the Statutes of the State of Wisconsin."

(b) The Federal Power Commission found in its order dated November 30, 1946 that no authorizations had been obtained from the Public Service Commission of Wisconsin, or from any of the municipalities proposed to be served in the State of Wisconsin to render the proposed service therein.

(c) Certain coal, railroad, dock and labor interests intervened in Docket G-669 and opposed the granting of the application of Michigan-Wisconsin to render its proposed service in Wisconsin, (Opinion No. 147, plaintiff's Ex. 22). In finding (4) in the order dated November 30, 1946 the Commission found that such authorizations were necessary and that its certificate would be granted on the express condition that they be obtained because without them the project could not be operated, and in said condition (ii) it [fol. 159] prohibited the use of any of the facilities described in said order until such authorizations were obtained. In Opinion No. 147 of the majority of the members of the Commission, adopted January 17, 1947, such opposition was reviewed and, among other things, the majority therein said "It is true that no public agency of the State of Wisconsin officially espoused the proposal of this Applicant". It then made certain other comments, including a quo-

tation from an exhibit introduced in evidence before it that "Wisconsin is the only state lying in the *board* Mississippi River Valley stretching from the Appalachian to the Rocky Mountains which does not have natural gas service." Then said Opinion concluded the discussion on that subject by saying:

"In view of the above, we are of the opinion that it is not in the public interest to deny the issuance of a certificate of public convenience and necessity by reason of the failure of Applicant to meet certain statutory requirements of the State of Wisconsin in the matter of local consents. Such consents must, of course, be secured. Our certificate, therefore, is conditioned upon the obtaining of such consents from the communities in Wisconsin proposed to be served as well as from the Public Service Commission of Wisconsin."

XXVIII

There is now pending and undisposed of in the United States Court of Appeals for the District of Columbia a second petition for review filed about July 2, 1947, Case No. 9588 in said Court, wherein Panhandle Eastern Pipe Line Company is seeking to have vacated the order dated November 30, 1946 here in question and the subsequent orders of the Federal Power Commission adopted in Docket G-669, issued after November 30, 1946 and up to and including March 12, 1947.

XXIX

Defendant Magnolia Petroleum Company appointed an agent for service of process in suits brought in the courts of Oklahoma only on causes of action arising in Oklahoma.

[fol. 160] CONCLUSIONS OF LAW

1. Subsection (e) of Section 7 of the Natural Gas Act, as amended, requires that certain facts must be found to exist as conditions precedent to the jurisdiction and authority of the Federal Power Commission to issue a certificate of public convenience and necessity, that is, (a) that the applicant is able and willing to do the acts and perform the service proposed by it and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission thereunder; and (b) that the proposed service, sale, construction and operation is or

will be required by the present or future public convenience and necessity.

2. General finding (6) in the Commission's order dated November 30, 1946, that Michigan-Wisconsin "is able and willing properly to do the acts and to perform the service proposed," and general finding (7) therein that the proposed construction and operation by Michigan-Wisconsin of its proposed facilities "are required by the public convenience and necessity," were contradicted and negatived by general finding (4) contained in said order that Michigan-Wisconsin "has not yet obtained, however, all the necessary approvals of operation from the State of Wisconsin and the communities to be served therein or of its proposed financing from the Securities and Exchange Commission" and that without "the obtaining of all such necessary consents and approvals, . . . the project can be neither financed, constructed, nor operated"; and were also contradicted and negatived by findings which are necessarily to be inferred from the nature and character of conditions (ii), (iii), (iv), (v), (vi), and (viii) therein. The Court therefore concludes that the Commission's finding (4) and the conditions imposed by the Commission, which refer to acts to be performed in the future or events to take place in the future, were of such a nature as to affirmatively establish that at the time the order was made the applicant was not able to do the acts and perform the service proposed.

3. Specifically, general findings (6) and (7) were contradicted and negatived by the nature and character of the [fol. 161] conditions set forth in said order, namely, condition (ii) that there shall be no transportation or sale of gas by means of "the facilities herein authorized until all necessary authorizations shall have been obtained from the State of Wisconsin and each of the communities proposed to be served in said state" as required by specified statutes of the State of Wisconsin, and condition (iii) that Michigan-Wisconsin must obtain the approval of its proposed plan of financing by the Securities and Exchange Commission and condition (iv) that there shall be no transportation or sale of gas by the use of a portion of said facilities until the Federal Power Commission approves a certain agreement between Michigan-Wisconsin and Michigan Consolidated, and condition (v) that there

shall be no transportation or sale of gas by the use of any of the authorized facilities unless Austin Field Pipe Line Company applies, within fifteen days, to the Commission for a certificate of public convenience and necessity relating to the construction and/or operation of certain additional facilities and unless the Commission grants such certificate, and condition (vi) prohibiting the use of any of said facilities until Michigan Consolidated files a proper application for a certificate relating to the construction and/or operation of certain additional facilities, and condition (viii) prohibiting the transportation or sale of gas to Michigan Consolidated by the use of any of said facilities, except with due regard to the rights and duties of Panhandle Eastern under its existing contract with Michigan Consolidated relating to natural gas service in the Detroit and Ann Arbor areas, which condition provided that the Commission should determine such rights and duties within fifteen days from the date of said order and should, after further hearings, adopt a supplemental order doing so.

4. Inasmuch as the findings and certain of the conditions in the order of November 30, 1946, here in question, affirmatively negatived the existence on that date of the basic jurisdictional facts stated in conclusion 1 above, the said order was and is absolutely null and void, and not merely voidable; and in consequence of such invalidity, the termination notices which the defendants delivered to the plaintiff on December 2, 1946, terminated [fol. 162] the respective contracts between the plaintiff and the defendants.

In the event the Court should refuse to adopt the above proposed conclusions of law numbered 2, 3, and 4, then the defendants respectfully request the court to make, adopt and enter herein the following conclusions of law:

5. The contracts between the plaintiff and the respective defendants contemplated that the certificate that was to be secured by Michigan-Wisconsin should be final and effective immediately vesting in Michigan-Wisconsin upon its issuance the right to proceed to acquire its facilities and to construct and operate its proposed pipe line, and that in the event it failed to secure such a certificate by October 1, 1946, then the defendants should have the right to terminate their respective contracts at any time after December 1, 1946, but before the issuance of such a certificate.

6. No certificate of the kind and character which was contemplated by the termination provisions of the respective contracts between the defendants and the plaintiff was issued on or prior to December 2, or December 3, 1946, and the written termination notices which were delivered by the respective defendants to the plaintiff on December 2, 1946, terminated said contracts.

7. Paragraph (C) contained in the order dated November 30, 1946, prohibited, not only the issuance of the said order, but also by necessary implication prohibited the issuance of the certificate therein purported to be issued, at any time prior, in any event, to the issuance of the opinions of the Commission or its members and of the supplemental order which condition (viii) contained in said order provided should be subsequently issued.

8. Paragraph (C) in the order dated November 30, 1946 postponed the date of the issuance of said order indefinitely, and therefore the said order was not effective either as an order or as a certificate prior to the issuance of the Supplemental Order on March 12, 1947, even if then.

9. In view of the terms and provisions of said order [fol. 163] dated November 30, 1946, and particularly paragraph (C) therein, the handing out on December 2, 1946 of copies thereof to persons who were waiting for such copies and the mailing on said day of copies thereof to parties to the proceeding in Docket G-669, did not constitute the issuance of said order, nor of a certificate of public convenience and necessity.

10. The order dated November 30, 1946 was not an issued order nor an issued certificate on November 30, 1946, nor on or prior to December 2 or 3, 1946, because the conditions precedent to the issuance thereof, set forth in said order, had not then been fulfilled.

11. Unless and until Michigan-Wisconsin signified in writing its acceptance as provided in condition (ix) of the order dated November 30, 1946, said order could in no event become effective as an issued certificate.

12. Section 7(c) of the Natural Gas Act, as amended, requires as a condition precedent to the authority and jurisdiction of the Federal Power Commission to issue a certificate of public convenience and necessity, that it first

decide an application for a certificate. In making such a decision the Act contemplates and requires final administrative action and the determination of all issues necessary to a final and complete decision of the application which leaves nothing further to be determined or disposed of with respect to the granting of such application. The Commission had not made such a final decision of the application of Michigan-Wisconsin prior to or at the time of the making of the order dated November 30, 1946 and it had not made such a decision prior to March 12, 1947, if even then, for there yet remained to be determined a number of questions as is shown by a number of the conditions contained in said order other than condition (viii).

13. The order dated November 30, 1946, shows on its face that the Commission did not intend that it should in any event be effective either as an order or as an issued certificate unless and until its opinions were issued and conditions (ii), (iii), (iv), (v), (vi), (viii), and (ix) therein set forth were fulfilled.

[fol. 164] 14. Michigan-Wisconsin Pipe Line Company had no legal right or authority under and by virtue of the order dated November 30, 1946 to commence or proceed with either the construction or operation of its proposed pipe line on November 30, 1947 or at any time subsequent thereto unless and until the conditions precedent contained in said order had been fulfilled.

15. The Court judicially knows that the provisions of the Statutes of the State of Wisconsin referred to in condition (ii) in the order dated November 30, 1946, read as follows:

"Section 196.49(4a) No public utility furnishing gas to the public in this state shall construct, install or place in operation any new plant, equipment, property or facility, or construct or install any extension, improvement, addition or alteration to its existing plant, equipment, property or facilities for the purpose of connecting its properties and system to a source of supply of gaseous fuel for sale to the public which is different from that which has been theretofore sold, or for the purpose of adapting its facilities to such different kind of gaseous fuel unless and until the commission shall have found and certified that the general public interest and public convenience and neces-

sity requires the same; nor shall any such public utility substitute natural gas or a mixture of natural and manufactured gas in lieu of manufactured gas for distribution and sale to the public without first having obtained from the commission a certificate that the general public interest and public convenience and necessity require the same. In making its determination, the commission shall give due consideration, among all other appropriate factors, to all matters affecting the public interest, including when the substitution of natural or a mixture of natural and manufactured gas in lieu of manufactured gas is involved, the social and economic effects thereof by reason of its effect upon employment, existing business and industries, railroads and other transportation agencies and facilities, the state, any of its political subdivisions, or any citizens or residents thereof. No such certificates of public interest and public convenience and necessity shall be issued which [fol. 165] shall authorize the substitution of natural gas or a mixture of natural and manufactured gas in lieu of manufactured gas, or the provision of facilities or expenditure of moneys therefor, in any city, village or town of which the board or municipal council shall not have first approved and authorized such substitution pursuant to the provisions of section 196.58 (6).

"Section 196.58 (6) No public utility furnishing and selling gaseous fuel to the public shall change the character or kind of such fuel by substituting for manufactured gas any natural gas or any mixture of natural and manufactured gas for distribution and sale in any town, village or city unless the municipal council thereof shall, by authorization, passage or adoption of appropriate contract, ordinance or resolution, approve and authorize the same. No such contract, ordinance or resolution, nor any failure or refusal by such municipal council to authorize, pass or adopt the same shall be subject to the review provided by subsection (4) of this section. (1931 c. 183 s. 3; 1943 c. 48)"

16. The Federal Power Commission was without authority to issue to Michigan-Wisconsin a certificate of public convenience and necessity unless and until it found as a fact that the Public Service Commission of the State of Wisconsin and the cities and towns in that state which said company proposed to serve with natural gas had granted the certificate *an*/or authorizations which were required

by the provisions of Sections 196.49(4a) and 196.58(6) of the Statutes of the State of Wisconsin, or reliable assurances had been given by said Public Service Commission and the proper officers of said cities and towns that such certificates and/or authorizations would be granted in the event the Federal Power Commission granted a certificate to Michigan-Wisconsin, and inasmuch as the Federal Power Commission did not make either of those findings its order dated November 30, 1946 was not on that date effective as an order or an issued certificate.

17. The Federal Power Commission had no authority to grant or to issue to Michigan-Wisconsin a certificate of [fol. 166] public convenience and necessity unless and until it found as a fact that the Securities and Exchange Commission had either approved the finacing of the construction and operation of the proposed pipe line, or had given a reliable assurance that it would approve said financing and authorize the issuance and sale of securities for that purpose upon the condition that the Federal Power Commission issue its certificate of public convenience and necessity to said company, and inasmuch as the Federal Power Commission did not make either of those findings its order dated November 30, 1946, was not on that date effective as an order or an issued certificate.

18. The Commission had no authority under the provisions of the Natural Gas Act to authorize Michigan-Wisconsin to construct its proposed pipe line unless and until it became financially able to do so and the Commission had so found. Condition (iii), when interpreted with finding (4), had the legal effect of withholding the granting of authorization to construct and operate the proposed pipe line until the Securities and Exchange Commission had approved and authorized the financing of said line. Even though the Commission may have intended on November 30, 1946 to endeavor to grant immediate authority to construct and operate said line and to immediately issue a certificate accordingly, that intention, if it existed, was defeated by the above referred to legal inhibition of the statute against the power of the Commission to carry it out. Therefore the Commission did not issue a certificate to said company on November 30, 1946.

19. The decision of the United States Court of Appeals for the District of Columbia on April 21, 1947 in Cause No.

9482, styled, Panhandle Eastern Pipe Line Company, a corporation, Petitioner, v. Federal Power Commission, Respondent, wherein it was held, among other things, that the order dated November 30, 1946 here in question was not final because not complete, was and is res adjudicata on the question as to whether said order was a final and complete order, and was and is binding and conclusive upon Michigan-Wisconsin Pipe Line Company and those in privity [fol. 167] with it, including the plaintiff Phillips Petroleum Company. Implicit in that decision was the holding that the order dated November 30, 1946 was not then effective either as an order or a certificate.

20. The order dated November 30, 1946 did not then become effective because the Federal Power Commission had not on or prior to said date adopted and issued its opinion setting forth its written findings of the essential basic and jurisdictional facts which the law required the Commission to make before it would have the power or authority to grant a final and effective certificate of public convenience and necessity for the construction and operation of an interstate gas pipe line.

21. To assert, as do the defendants, that the order dated November 30, 1946 did not satisfy the defendants' contracts and did not defeat the right to terminate granted by the contracts is not to attack said order, either directly or collaterally.

22. The Court declares that the contracts between defendants and plaintiff were effectively terminated by reason of the termination notices delivered by defendants to plaintiff on December 2, 1946.

23. In the event the Court makes and adopts herein such findings of fact and conclusions of law as lead to a decree to be rendered herein adversely to these defendants on the issue as to whether their respective contracts were terminated by their respective termination notices, then such decree shall be without prejudice to any rights which the defendants now or may hereafter have to terminate, cancel or rescind their said contracts, under the terms and provisions thereof or otherwise, in the event the order dated November 30, 1946 here in question should be vacated by the United States Court of Appeals for the District of Columbia or the Supreme Court of the United States in

[fol. 168] review proceedings, or by any other court of competent jurisdiction, or by the Federal Power Commission.

Respectfully submitted, W. P. Z. German, Alvin F. Molony, Hawley C. Kerr, Attorneys for Defendant, Skelly Oil Company; Dan Moody, Attorney for Defendant Magnolia Petroleum Company; Ray S. Fellows, Dan Moody, John W. Stayton, Charles L. Black, Attorneys for Defendant Stanolind Oil and Gas Company.

John F. Jones, W. P. Z. German, Jr., Of Counsel for Skelly Oil Company; Walace Lawkins, Earl Brown, Raymond M. Myers, W. R. Wallace, Of Counsel for Magnolia Petroleum Company; Donald Campbell, L. A. Thompson, Of Counsel for Stanolind Oil and Gas Company.

[Certificate of service attached to original.]

Filed April 28, 1948.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—May 21, 194-

The Court makes and enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1

The plaintiff, Phillips Petroleum Company, is a Delaware corporation and is duly authorized and qualified to do [fol. 169] business in the State of Oklahoma with its principal place of business at Bartlesville. The defendants, Skelly Oil Company and Stanolind Oil and Gas Company, are Delaware corporations and each is duly authorized and qualified to do business in the State of Oklahoma and the principal place of business of each is in Tulsa. The defendant, Magnolia Petroleum Company is a Texas corporation and is duly authorized and qualified to do business in the State of Oklahoma. Magnolia owns substantial property in Tulsa. Each of the defendants had appointed an agent for the service of process within the State of Oklahoma in accordance with the statutes of that state. The Michi-

gan-Wisconsin Pipe Line Company, a Delaware corporation, was a party plaintiff, but was dropped as a party by order of the Court filed on November 24, 1947.

2

The jurisdiction of the Court is founded on the existence of a federal question arising under the Natural Gas Act, 15 U. S. C. A. 717, et seq. The amount in controversy exceeds the sum or value of $3,000.

3

During and prior to the month of December, 1945, Michigan-Wisconsin Pipe Line Company was desirous of obtaining from the Federal Power Commission a certificate of public convenience and necessity under the requirements of the Natural Gas Act for a pipe line system which it proposed to construct and operate from a point in the State of Texas to points in the states of Michigan and Wisconsin, or either of them, and at intermediate points. In order to obtain the certificate, it was necessary, along with other requirements, that the pipe line company have made available to it adequate reserves of natural gas. Phillips, during the month of December, 1945, was negotiating with the pipe line company for a contract whereby Phillips would be obligated to make available to the pipe line company certain reserves of natural gas in the Hugoton Field, including not only gas to be produced from the properties of Phillips, but also gas which Phillips purchased from others.

[fol. 170]

4

On December 5, 1945, Phillips and Stanolind entered into a written contract under which Stanolind agreed to sell and Phillips agreed to buy a large amount of gas to be produced from approximately 118,000 acres of land located in Dallas, Sherman and Hansford counties, Texas, and in Texas County, Oklahoma, and comprising a part of the Hugoton Gas Field. On the same date Phillips entered into a similar contract with Skelly covering approximately 46,528 acres of land in Sherman and Hansford counties, Texas, in the same gas field; and on the 7th day of December, 1945, Phillips entered into a similar contract with Magnolia covering approximately 25,000 acres of land in Sher-

man and Hansford counties, Texas, a part of the same field. The contract between Magnolia and Phillips was executed in duplicate by Magnolia in Dallas, Texas, and returned to Bartlesville, Oklahoma, by an agent of Phillips and executed by Phillips in Bartlesville, and one of the executed duplicates of it was returned to Magnolia in Dallas by mail.

5

Each of the three contracts between Phillips and the defendants contains, among others, the following recitations:

"It is proposed that the said contract, hereinafter referred to as the 'pipe line contract', in which Phillips Petroleum Company is designated as 'Seller' and the Michigan-Wisconsin Pipe Line Company is designated as 'Buyer', will contain, among others, the following provisions:

"• • • Upon the happening of any one of the following contingencies, to-wit:

(a) The failure of the Buyer to procure from the Federal Power Commission, on or before September 1, 1946, a Certificate of Public Convenience and Necessity for the construction and operation of the Pipe Line, or,

(b) The issuance by the Federal Power Commission of an order refusing to grant a Certificate of Public Convenience and Necessity for the Pipe Line, or

[fol. 171] (c) The failure of the Buyer to commence the actual construction of the Pipe Line on or before March 1, 1947, or

(d) The failure of the Buyer to commence on or before January 1, 1948, the acceptance of deliveries of gas hereunder for delivery by Buyer for resale in one or more municipalities east of the Missouri River,

Seller shall have the right to terminate this contract by written notice to be delivered to Buyer not later than thirty (30) days after the happening of such contingency.' "

The above provisions were inserted in the contract entered into by Phillips and Michigan-Wisconsin on December 11, 1945.

Each of the three contracts with the defendants contains in Section 2 of Article II the following termination provision:

"Section 2. If the proposed contract between Buyer and Michigan-Wisconsin Pipe Line Company is not consummated on or before the first day of January, 1946, or if said contract is consummated and thereafter terminated upon the happening of one of the four contingencies hereinbefore quoted from said proposed contract, then and in either of those events either party shall have the right to terminate this contract by written notice to be delivered to the other party within thirty (30) days after the said first day of January, 1946, in case the said pipe line contract is not consummated, or within thirty (30) days after the termination of the pipe line contract as aforesaid; provided, however, that, in the event this contract shall not be terminated for any of the foregoing reasons on or before October 1, 1946, and in the event Michigan-Wisconsin Pipe Line Company shall fail to secure from the Federal Power Commission on or before that date a certificate of public convenience and necessity for the construction and operation of its pipe line, Seller shall have the right to terminate this contract by written notice to Buyer at any time after December 1, 1946, but before the issuance of such certificate. Immediately upon the occurrence of any of the events or contingencies hereinbefore mentioned in this Section 2 or [fol. 172] in the event of the termination by Buyer herein of its contract with Michigan-Wisconsin Pipe Line Company, Buyer herein shall give Seller herein notice thereof by telegram, to be confirmed by letter."

6

Michigan-Wisconsin had previously and on September 24, 1945, filed its application with the Federal Power Commission for a certificate of public convenience and necessity authorizing it to construct and operate an interstate gas pipe line from Hugoton Gas Field in Texas to points in the states of Michigan and Wisconsin, which application the Commission docketed as Docket No. G-669. It later filed several amended applications in the same proceeding. Panhandle Eastern Pipe Line Company intervened in the proceeding and moved to dismiss the Michigan-Wisconsin application on the ground, among others, that Panhandle East-

ern, under certificates held by it, had a prior right to serve and to continue to serve the Detroit and Ann Arbor markets in the State of Michigan.

7

The Federal Power Commission conducted a number of hearings in Docket G-669, at which evidence was received, the first starting April 16 and ending May 3, 1946, and another for three days in the latter part of May, 1946, and thereafter it was in almost continuous session receiving evidence and conducting hearings from August 6, 1946, through November 13, 1946, and oral arguments were heard commencing on November 20, and ending November 23, 1946. On November 30, a Saturday, the Commission in executive session made an order granting, with conditions, a certificate of public convenience and necessity to the Michigan-Wisconsin Pipe Line Company. During this session as the members of the Commission came to agreement as to the wording of the order, Mr. Fuquay, the secretary of the Commission, prepared the order in full and exact text. The secretary was directed by the Commission to release the order immediately.

[fol. 173] 8

After the adjournment of the session of November 30, 1946, Mr. Fuquay on that date sent the following telegram to the parties to the proceedings:

"Commission today adopted findings and order, denying motion of Panhandle Eastern to dismiss application of Michigan-Wisconsin Pipe Line Company in Docket No. G-669. • • • Commission adopted opinion and order, in Docket No. G-669, issuing certificate, with conditions, to Michigan-Wisconsin Pipe Line Company. Supporting and dissenting opinion in last named docket will be available at early date. All orders available afternoon December 2."

None of the defendants herein were parties to this proceeding and none of them received a copy of the above telegram. On this same day, releases to the press were made announcing the action taken by the Commission.

9

On December 2, 1946, the draft copy of the order was mimeographed by the office of the secretary and these copies became available to the parties to the proceedings and to the public not earlier than 6:15 P. M., E.S.T., December 2, 1946.

10

The Commission intended that the order in question be deemed issued and effective on November 30, 1946.

11

Each of the defendants on December 2, 1946, delivered to the plaintiff at its office at Bartlesville, Oklahoma, a telegraphic notice of its termination of the contract. The Stanolind telegram was received by plaintiff at 9:45 A. M., C.S.T.; the Magnolia telegram at 1:00 P. M., C.S.T.; and the Skelly telegram at 5:09 P. M., C.S.T. These notices were given by the defendants in an attempt to exercise the option to terminate provided for in Article II, Section 2 of the contract.

[fol. 174] 12

Paragraph (C) of the order of November 30, contained the following provision:

"For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later."

On December 27, 1946, Panhandle Eastern filed in Docket G-669 an application for vacation of the order dated November 30, or in the alternative for a rehearing of the order. On December 30, 1946, similar applications were filed by other interveners. All of these applications were denied by the Commission by an order dated January 14, 1947, issued January 15, 1947, on the ground that the same were prematurely filed, and particularly because of the provisions of paragraph (C) of the order. In this order the Commission stated that neither the opinions or supplemental order had been issued, and that accordingly, the applications for reconsideration or rehearing were premature.

13

Panhandle Eastern Pipe Line Company, acting under Section 19 of the Natural Gas Act, filed in the United States Court of Appeals for the District of Columbia its petition for the review of the order of November 30, 1946. The Court of Appeals on April 21, 1947, made and entered an order of dismissal of the petition for review stating as its reason for so doing that the order of November 30 was not final. Certiorari was applied for in the Supreme Court of the United States and was denied on October 13, 1947.

14

The order of November 30, 1946, also contained, among others, the following condition:

"(ix) Applicant shall, within fifteen days after the issuance of the supplemental order herein, notify the Commission in writing whether the certificate as herein issued is acceptable to it."

[fol. 175] Michigan-Wisconsin filed with the Commission on January 14, 1947, a letter dated January 13, 1947, stating that the certificate was acceptable to the company.

15

On December 14, 1946, the Commission adopted an order issued December 16, 1946, in which it amended condition (viii) contained in the order of November 30, by changing the words "fifteen days" to "thirty days". On December 30, 1946, the Commission adopted another order in Docket G-669, which supplemented the order of November 30, by adding thereto eight additional findings and ordering that they be added to the November 30th order as findings numbered nine through seventeen thereof. Also, in this order the Commission ordered that the proceedings in Docket G-669 "be and it is hereby reopened", limited, however, to the receipt of further evidence with respect to Condition (viii) of the order. The Commission in its Opinion 147, adopted January 17, 1947, dealt with the matters relating to Conditions (ii) and (iii) of the order of November 30, 1946. On February 20, 1947, the Commission by vote of a majority adopted the Supplemental Opinion No. 147-A, concerning the matters dealt with in Condition (viii) of

the order of November 30. The Supplemental Opinion and Supplemental Order were issued March 12, 1947. On November 13, 1947, the Commission adopted an order issued on November 14, 1947, relating to the matters contained in Conditions (v) and vi) of the order of November 30, 1946.

16

There is now pending and undisposed of in the United States Court of Appeals for the District of Columbia a second petition for review filed on July 2, 1947, wherein Panhandle Eastern Pipe Line Company is seeking to have vacated the order of November 30, and the subsequent orders of the Federal Power Commission adopted in Docket G-669, issued after November 30 and up to and including March 12, 1947.

17

The construction of the pipe line was commenced by Michigan-Wisconsin Pipe Line Company on December 10, 1947.

[fol. 176] Conclusions of Law

1. The Court has jurisdiction of the parties to the suit and of the subject matter of the action.

2. A certificate of public convenience and necessity was on November 30, 1946, issued by the Federal Power Commission to Michigan-Wisconsin Pipe Line Company for the construction and operation of a gas pipe line project from a point in the Hugoton Field in Texas to points of distribution in Wisconsin and Michigan and at intermediate points.

3. The certificate issued by the Commission to Michigan-Wisconsin on November 30, 1946, although containing terms and conditions, was and is a certificate issued under the requirements of the Natural Gas Act and one that is provided for by that act. A consideration of the contracts between plaintiff and defendants, together with the contract between plaintiff and Michigan-Wisconsin, compels a conclusion that such certificate was one within the contemplation of the parties and satisfied the terms of the contracts.

4. The certificate is not void upon its face. It discloses that the Commission made the essential findings of ultimate facts required by the Natural Gas Act. Such findings

were made in the language of the act, itself. The basic factual findings do not negative the findings of ultimate facts. Even assuming an absence of adequate findings of basic facts to support the ultimate facts found by the Commission, the order of November 30, 1946, is invulnerable to attack in this proceeding. It may be vacated and set aside only by direct attack.

5. The notice of termination delivered by each defendant to the plaintiff on December 2, 1946, did not effectively terminate the contract between it and plaintiff. Such contracts remain in full force and effect.

6. In view of the foregoing conclusions, it is deemed unnecessary to decide questions pertaining to the applicability of: (a) the Sunday rule; (b) the split day rule; (c) the substantial compliance rule, or (d) the rule against forfeitures.

[fol. 177] 7. Judgment should be entered for the plaintiff without prejudice to any rights which the defendants may have hereafter to terminate the contracts, in the event the order of November 30, 1946, should be vacated and set aside by the United States Court of Appeals for the District of Columbia or by the United States Supreme Court in the direct attack now being made on such order, or in the event the order should be set aside by the Federal Power Commission.

Dated this 21st day of May, 1948.

Royce H. Savage, United States District Judge.

Filed May 21, 1948.

IN UNITED STATES DISTRICT COURT

DECREE—May 21, 1948

Judgment is hereby entered for the plaintiff against each of the defendants in conformity with the findings of fact and conclusions of law filed herein on this date adjudging and decreeing that the contract between the plaintiff and each defendant has not been effectively terminated and that each of such contracts remain in full force and effect and the parties should be governed accordingly.

This judgment shall be without prejudice to any rights which the defendants may have hereafter to terminate the contracts in event the order of the Federal Power Commission of November 30, 1946, issuing a certificate of convenience and necessity to Michigan-Wisconsin Pipe Line Company should be vacated by the United States Court of Appeals of the District of Columbia or by the United States Supreme Court, or in the event the order should be set aside by the Federal Power Commission.

The costs are taxed against the defendants.

Dated this 21st day of May, 1948.

Royce H. Savage, United States District Judge.

Filed May 21, 1948.

[fol. 178] In United States District Court

Notice of Appeal—Filed June 19, 1948

Notice is hereby given that Skelly Oil Company, Stanolind Oil and Gas Company, and Magnolia Petroleum Company, defendants in the above numbered and entitled cause, hereby appeal to the Circuit Court of Appeals for the Tenth Circuit from the final judgment entered in this action on May 21, 1948.

Dated June 16, 1948.

W. P. Z. German, Hawley C. Kerr, Attorneys for Appellant, Skelly Oil Company; Donald Campbell, Charles L. Black, Dan Moody, Ray S. Fellows, Attorneys for Appellant, Stanolind Oil and Gas Company; Walace Hawkins, Dan Moody, Attorneys for Appellant, Magnolia Petroleum Company.

Filed June 19, 1948.

[An appeal bond was filed June 19, 1948.]

In United States District Court

Statement of Points on Which Appellants Intend to Rely on Appeal—Filed June 24, 1948

The points upon which the appellants, defendants in the above-entitled action, intend to rely on appeal are the following:

The District Court erred in the following respects:

(1) In denying the motions of the appellants to dismiss the action for lack of jurisdiction of the subject matter, and in holding that it had jurisdiction thereof.

(2) In denying the motion of defendant Magnolia Petroleum Company to quash the service on it and to dismiss [fol. 179] this case as to it because of improper venue and lack of jurisdiction over its person.

(3) In denying the motion of appellants to abate this cause or, in the alternative, to stay further proceedings therein pending the trial of and decision in the two cases which, prior to the commencement of this action, had been filed against the appellee herein in the state court in Texas by the appellants Stanolind Oil and Gas Company and Skelly Oil Company, respectively, involving the same subject matter.

(4) In denying the motions of the appellants for a severance of the separate causes of action against them.

(5) In holding that the contracts between the appellants and the appellee were not terminated by the termination notices delivered by the respective appellants to the appelle on December 2, 1946, and in refusing to find and adjudge that said contracts were terminated.

(6) In holding that the order of the Federal Power Commission dated November 30, 1946 in its Docket No. G-669, relating to the granting of a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company, was not void on its face, and in holding in that connection that the "basic factual findings" do not negative the findings of ultimate facts, and in not holding that said order was void on its face.

(7) In holding that the Federal Power Commission issued a certificate of public convenience and necessity to

Michigan-Wisconsin Pipe Line Company on November 30, 1946.

(8) In holding that the order dated November 30, 1946 was and is a certificate issued under the requirements of the Natural Gas Act and one that is provided for in said Act.

(9) In holding that the order dated November 30, 1946 was and is such a certificate as was within the contemplation of the parties to the respective contracts between the [fol. 180] respective appellants and the appellee and satisfied the terms of said contracts.

(10) In failing and refusing to find and hold, as requested by appellants in their requested finding of fact III and conclusion of law 5, in substance that the termination provisions of each of the contracts between the appellants and the appellee contemplated the issuance on or prior to December 2, 1946 by the Federal Power Commission of a final and immediately effective certificate to Michigan-Wisconsin Pipe Line Company, and that in the event such a certificate should not be issued on or prior to December 2, 1946 the respective appellants would have the sight on or after that date, but prior to the issuance on or after that date of such a certificate, to terminate their respective contracts.

(11) In holding that said contracts between the appellants and the appellee were not terminated by said termination notices, but remain in full force and effect.

(12) In failing and refusing to hold, as requested by appellants, that the order dated November 30, 1946 represented incomplete administrative action by said Commission, was not a final order, nor a final decision by the Commission of the application of Michigan-Wisconsin Pipe Line Company for a certificate such as was required by the Natural Gas Act and that said order did not on its date grant a certificate to the applicant.

(13) In failing and refusing to find and hold that the provisions of paragraph (C) of said order dated November 30 postponed the effective date of said order and the issuance thereof either as an order or as a certificate unless and until at some future time the Commission should

make and issue its basic detailed findings of fact in the form of "an opinion" and should make and issue its supplemental order provided for by condition (viii) of said order, and that said opinion was not issued until February 7, 1947 and said supplemental order was not issued until March 12, 1947.

(14) In failing and refusing to find and hold that, due to the provisions of condition (ix) contained in said order [fol. 181] dated November 30, 1946, in no event did or could said order be or become effective as an order providing for or issuing a certificate to Michigan-Wisconsin Pipe Line Company unless and until the certificate it purported to issue was accepted in writing by Michigan-Wisconsin Pipe Line Company, which acceptance was not filed with the Commission until January 13, 1947.

(15) In failing and refusing to hold that each of the conditions numbered (ii) to (ix), inclusive, contained in said order was a condition precedent to the issuance of the purported certificate and prevented said order from being or becoming effective as a certificate unless and until said conditions should be fulfilled, and that none of them was fulfilled until long after the delivery by appellants of their respective termination notices, and that some of them have not yet been fulfilled.

(16) In failing and refusing to find and hold, that, even if said order dated November 30, 1946 granted the application for a certificate, nevertheless such certificate was not issued, that is, reduced to writing in final form, and signed, sealed and delivered to Michigan-Wisconsin Pipe Line Company prior to the delivery of the appellants' termination notices.

(17) In failing and refusing to find and hold, as requested by appellants in their proposed conclusion of law 8, that no such certificate as was contemplated by the contracts had been issued by said Commission at the time the respective appellants undertook to and did terminate said contracts by the notices delivered to appellee on December 2, 1946.

(18) In finding that the Secretary of the Commission prepared said order dated November 30 in full and exact text on said date, and in failing and refusing to find that

on said date the Commission by majority vote directed the Secretary of the Commission to make changes in a preliminary draft of an order relating to a certificate to Michigan-Wisconsin Pipe Line Company, which changes he made by erasures and interlineations, and that said draft so changed was called a "master draft" and constituted [fol. 182] the Secretary's notes relating to the form and content of an order to be subsequently drafted in final form by him; that said "master draft" was neither signed nor entered of record as an order of the Commission, was not available for inspection by the parties to the proceedings in Docket No. G-669, or to others, but was a confidential memorandum which the Secretary refused to produce at the taking of his deposition in this action, and that on December 2, 1946 said notes were used by the Office of the Secretary in mimeographing and putting the order bearing date of November 30 in final form, and on said December 2, 1946 one of said mimeographed copies was signed and sealed by the Secretary, and that it, and not the "master draft", constituted the official order of the Commission, copies of which were made available to the parties and others on December 2, 1946, as found by the court in its finding number 9.

(19) In finding that the Secretary was directed by the Commission to release immediately the order dated November 30, 1946.

(20) In finding that the Commission intended that the order dated November 30, 1946 be deemed issued and effective on that date.

(21) In failing and refusing to adopt or in substance make as findings of fact of the court each of the following findings of fact requested by the appellants, that is, their requested findings numbered III, VIII, X, XII, XIII, XIV, XV, XVI; that portion of their requested finding XX to the effect that the Court of Appeals for the District of Columbia dismissed Panhandle Eastern Pipe Line Company's petition for review of the said order dated November 30, 1946, and four other orders, on the ground, (not only as found by the district court that the order of November 30, 1946 was not final, but also) that it was not final because it required for completion the issuance of a supplemental order or orders which had not yet been is-

sued by said Commission, and subdivision (c) of said requested finding XX; subdivision (b) of their requested finding XXI; and their requested findings XXIV, XXV, XXVII and XXIX.

[fol. 183] (22) In making and adopting each of the court's conclusions of law numbers 1, 2, 3, 4, 5 and 6.

(23) In failing and refusing to adopt or in substance make each of the following numbered conclusions of law requested by appellants, that is, their requested conclusions of law 1, 2, 3 and 4, or in the alternative, their requested conclusions of law 5 to 22, both inclusive.

(24) In rendering and entering its decree dated May 21, 1948 in favor of the appellee, because the same is not supported by the evidence and is contrary to the applicable law.

(25) In failing and refusing to render and enter a decree in favor of the appellants and each of them in accordance with the prayers of their respective answers.

Dated June 24, 1948.

W. P. Z. German, Hawley C. Kerr, Attorneys for Appellant, Skelly Oil Company; Donald Campbell, Charles L. Black, Dan Moody, Ray S. Fellows, Attorneys for Appellant, Stanolind Oil and Gas Company; Dan Moody, —— ——, Attorney for Appellant, Magnolia Petroleum Company.

[Certificate of service attached to original.]

Filed June 24, 1948.

In United States District Court

Order Extending Time for Docketing Cause—July 19, 1948

On application of the defendants-appellants and for good cause shown, it is ordered that the time for filing the record on appeal in the Circuit Court of Appeals [fol. 184] in the above entitled action and docketing the

appeal is hereby extended to and including August 28, 1948.

Done in open court this July 19, 1948.

Royce H. Savage, District Judge.

OK for all defendants
W. P. Z. German.

Filed July 19, 1948.

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PRE-TRIAL PROCEEDINGS—Filed July 23, 1948

Be it remembered that on the 17th day of February, A. D., 1948, in the above-designated Court, sitting at Tulsa, Oklahoma, the Honorable Royce H. Savage, United States District Judge, presiding, this above-styled and numbered cause came on regularly for pre-trial hearing.

The plaintiffs were present and represented by Harry D. Turner, Esq., Donald R. Richberg, Esq., Charles D. Shannon, Esq., Eugene O. Monnet, Esq., Jack R. Hays, Esq., Don Emery, Esq., Rayburn L. Foster, Esq., R. B. F. Hummer, Esq., H. K. Hudson, Esq., George L. Sneed, Esq., Darlene G. Anderson, Esq., Attorneys and Counselors at Law.

The defendants were present and represented by W. P. Z. German, Esq., John F. Jones, Esq., W. P. Z. German, Jr., Esq., Hawley C. Kerr, Esq., Wallace Hawkins, Esq., W. R. Wallace, Esq., Dan Moody, Esq., Charles Black, Esq., Ray S. Fellows, Esq., Charles R. Fellows, Esq., Donald Campbell, Esq., and L. A. Thompson, Esq., Attorneys and Counselors at Law.

And thereupon the following proceedings were had to wit:

The Court: I don't know just how we should proceed this morning. First, let me ask if the plaintiff will desire to present evidence in addition to this deposition.

Mr. Turner: Well, Your Honor, we may want to present [fol. 185] some additional evidence which would be more or less on formal matters, unless the parties defendant will agree to such things as the execution of the contract between Phillips Petroleum Company and Michigan-Wis-

consin Pipe Line Company. As I understand their pleadings they do not admit—admit that contract. I don't think there can be much of an issue over it.

Mr. German, Sr.: We will admit it.

Mr. Black: It is admitted in the pleadings.

The Court: Let me say this: As a usual proposition in having the pre-trial hearing in the case I would want to have a rather complete statement as to what the proof would be in the case and to have the legal issues fully outlined at the pre-trial; but I have heard enough about this case already that I think I am fairly well informed as to what the issues are—or perhaps I should say, as to what the issue is. It comes down pretty much to one question. There may be different theories advanced of course as to whether the action taken by the Federal Power Commission constituted the issuance of a certificate or not, but at any rate as I understand it, the case turns on the question of whether a certificate was issued by the Federal Power Commission before the defendants served notice of their election to cancel the contract according to its terms—that is, the three contracts providing that the defendants might cancel if the certificate was not issued before December 1st. I don't know that it would serve any useful purpose to have complete statements here this morning. It seems to me that your evidence will be largely documentary—probably this deposition covers it pretty well; it is all a question of what took place before the Federal Power Commission insofar as the facts are concerned.

So, if you will suggest any evidence that you desire to go into the record and ask the defendants if they will make certain admissions, it may be that we can get the case in shape that it can be submitted on this testimony.

Mr. Turner: Your Honor, is it the practice for us to stand?

[fol. 186] The Court: No, you may remain seated if you like.

Mr. Turner: As I understand it, all the defendants now admit the execution of the contract between Phillips Petroleum Company and Michigan-Wisconsin Pipe Line Company, the contract being attached to our complaint as an exhibit.

The Court: That is admitted, is it not by all the defendants?

Mr. Black: It is admitted in the pleadings.

Mr. German, Sr.: Yes.

Mr. Turner: Now, there were two amendments to that contract, which extended the time, or provided for an enlarged time for the commencement of construction of the pipe line that is involved, and the commencement of the supplying of gas to that pipe line; and we would like to prove those amendments unless the defendants will agree to them. We have photostatic copies of them.

Mr. German: I never heard of that before.

Mr. Turner: Those amendments merely extend the time, Your Honor, that the Michigan-Wisconsin Pipe Line Company will have to start the construction of the line and do certain other things that the dates were fixed for in the original contract, and those dates were merely set out—

Mr. Moody: We don't agree to the admissibility of those instruments or their materiality, but if they say they have got such instruments, I don't see any necessity of having proof.

Mr. Turner: Introduction of the photostatic copies will be sufficient then.

Mr. Moody: Yes.

Mr. German, Sr.: Well, you agree in that connection that the defendants were not parties and did not approve or consent to those amendments, don't you—didn't even know of them?

[fol. 187] Mr. Turner: Well, the amendments were made between the Phillips Petroleum Company and the Michigan-Wisconsin Pipe Line Company. We will admit that these parties were not parties to the—to that contract—that is, they were secondary parties.

The Court: They were not parties to the amendments and neither were they consulted about the execution of the amendments.

Mr. Turner: As far as I know that is correct.

The Court: As I understand it, the defendants will agree that those two amendments were executed by the parties, but they reserve the right to object on the grounds that they are not competent or relevant to any issue in the case.

Mr. Kerr: May I inquire as to the dates?

The Court: Well, suppose you furnish them with photostat copies.

Mr. Turner: Yes, sir.

The Court: Do you have them now?

Mr. Turner: I have one photostat of each—will be glad to let you see them when we get through here and——

Another of Counsel for Defendants: Could you mail one to each defendant? We are trying to keep these files separate.

Mr. Turner: Yes, sir, I will be glad to do that as soon as I get the photostats made.

Mr. German, Sr.: Do you also agree that the defendants were not advised of course of the amendments?

Mr. Turner: Well, now, that—as far as my information is at this time, they were not; that is, I have no information at this time that they were. That, I have not checked fully enough——

The Court: Would those amendments in any way affect the rights of the defendant to cancel as provided in the contract entered into with the defendants?

[fol. 188] Mr. Turner: Only to this extent: That under our contracts with these defendants, if we terminated the contract which we had with Michigan-Wisconsin, then they would have the right of termination.

The Court: I see.

Mr. Turner: We merely want to establish that we did not terminate that contract with Michigan-Wisconsin Pipe Line Company.

Mr. Moody: We admit in the pleadings that the contract—if that is all he is trying to prove, we admit in the pleadings the contract between Michigan-Wisconsin and Phillips has not been terminated—that is my recollection of the pleadings.

Mr. Turner: Is it admitted then by all defendants that the contract between Phillips Petroleum Company and Michigan-Wisconsin Pipe Line Company is in full force and effect?

Mr. German, Sr.: If you say so, we will admit it.

Mr. Turner: Yes, sir.

Mr. Black: With the understanding, however, it has been amended; of course the amendment would make a new contract.

Mr. German, Sr.: To which we were not parties and did not consent.

Mr. Black: We don't want to agree that the original contract is still in force and effect because it is amended; the amendment would create a new contract, composed of part of the old and part of the new.

The Court: Well, I don't know about that.

Mr. Turner: Well, will you agree to this: That the contract as amended by these two amendments, which I have mentioned, photostatic copies of which I will give to you, between Phillips Petroleum Company and Michigan-Wisconsin, is in full force and effect.

[fol. 189] Mr. Black: Subject to the reservation I made; we don't want to make any admissions that go to the legal effect, if Your Honor please.

Mr. German, Sr.: That's right; we don't know what the legal effect of those amendments were on our right; we have never seen them and we would want an opportunity to study them to see what we think about that.

The Court: Uh huh.

Mr. German, Sr.: This is new to us.

The Court: All right, the amendment goes to this proposition—I mean the agreement goes to this then: That the amendments may be offered in evidence, and the defendants will agree that the photostatic copies do constitute the amendments executed by the parties to the contract and they reserve only the right to object on the ground that the amendments are not material to any issue in the case.

Mr. Black: That's all right.

The Court: Now, anything else?

Mr. Turner: The line was—the pipe line question, the construction of it commenced on December 12, 1947, is that—will the defendants admit that? We are prepared to prove it.

Mr. Campbell: We received a wire from you saying construction started; I know nothing about it except your telegram or your letter.

Mr. Turner: We are prepared to prove it, if need be; we can bring the people who actually started construction of the line.

Mr. Campbell: I say again, as far as I am concerned, I would not have any objection to admitting it subject to materiality or competency.

Mr. Turner: Is that true of the other defendants?

Mr. Moody: What do you mean by "constructed"?

Mr. Turner: Actually started digging the ditch and putting the pipe in the ground.

[fol. 190] Mr. Campbell: Have they continued?

Mr. Turner: Yes, sir.

Mr. German, Sr.: What date was that started?

Mr. Turner: December 12, 1947. Is that admitted?

The Court: Just a moment; Mr. Campbell admits it on behalf of the Stanolind. What about the others?

Mr. German, Sr.: I think we will admit it for Skelly.

Mr. Moody: We will admit it for Magnolia.

The Court: All right, anything further?

Mr. Moody: That is, the same admission, subject to its materiality.

Mr. Turner: Will it also be admitted that each of the defendants received notification of the construction of that line?

Mr. Campbell: Stanolind did; I don't know about the others.

Mr. German, Sr.: Skelly received such a notice sometime late in December, 1947, I have forgotten the date.

Mr. Moody: Magnolia received a telegram to that effect.

The Court: All right, anything further on that?

Mr. Turner: We plead in our complaint that a telegram was sent by Mr. Fuquay, Secretary of the Federal Power Commission, on November 30, 1946, advising the parties of the fact that a certificate of convenience and necessity had been issued in the Michigan-Wisconsin proceeding that is involved. Mr. Fuquay testified in his deposition that on that day he dictated the wire, and after it was dictated with the addressees shown on the wire it was submitted back to him and he checked it over to make sure it was the way he dictated it, put his initials on it and gave it to his secretary or stenographer with instructions to deliver it to the Western Union office for immediate transmission. Will it be admitted that that wire was sent out?

[fol. 191] Mr. Moody: Well, there is controversy about that; I believe as far as I am concerned I am going to let you prove that.

Mr. Turner: All right, we are prepared to produce photostatic copies of the wires received by several of the addressees, at least. Now, rather than to bring the people here who received those wires, and bring the actual wires, we would propose to introduce photostatic copies of the wires of the Western Union, as actually received by these

parties, and together with a certificate, in case of a public—receipt by a public body, such as a State Commission, of someone connected with that Commission, that that is a photostatic copy of the wire in their files, or the wire they received, or an affidavit in the case of an individual. Will it be agreed that that will be sufficient as proof of the receipt of those wires by those particular addressees?

Mr. German, Sr.: Will there be a showing in that connection as to whether they received them?

Mr. Turner: The wires will show—they will have the regular time put on them by the Western Union, that is they will show the time in the manner in which the Western Union ordinarily shows the time, that the wire was transmitted from its Washington office, and then it will also show the hour that the wire was received at the Western Union office of the city in which the addressee was located.

Mr. German, Sr.: But it won't show when the addressee received the wire?

Mr. Turner: They will not show the exact hour that the Western Union delivered or handed the wire to the addressees, that is correct.

The Court: Is there any reason why that information should not be covered in the affidavits?

Mr. Turner: The hour of the receipt?

The Court: The actual receipt—the delivery.

Mr. Turner: There is no reason as far as we are concerned unless it is just the case of some public official, some [fol. 192] Commission who is incidentally interested in the proceeding, they have got the wire, they remember having received it, but the wire, having come in in 1946, it may be a tax on their memory to prove the exact hour, as far as we are concerned—as far as we are concerned if they have any memory of it, any recollection of it, we will be glad to have it established by affidavit. We—for our purpose we think it is sufficient to merely show the wire having been sent out by the Western Union. When they were sent out would certainly be sufficient time, with Mr. Fuquay's testimony if Mr. Fuquay's testimony itself is not sufficient. We just want to establish receipt of the wires by some of those addressees so as in our opinion to leave no —that is, sending out of the wires to some of the addressees, so as to leave no question in our mind that the wires were sent out by Mr. Fuquay.

Mr. Moody: Mr. Turner, can you give us copies of the wires and the affidavits? In all probability we can agree to let you prove it by copies of the wires and affidavits without calling the witnesses.

Mr. Black: We haven't had an opportunity to check them.

Mr. Turner: I will be glad to submit photostatic copies to them, and a——

The Court: Suppose we have this understanding: That the plaintiff will submit copies of executed affidavits—that is, affidavits obtained for the purpose of making the proof that he has outlined, together with photostatic copies of the wires in question, and we will assume that the defendants will be agreeable to making the proof in that fashion unless you advise them to the contrary.

Mr. Black: That's all right.

The Court: And, of course, if you get caught at the trial by surprise on account of objection to proof on that score, then I can take care of it—give a little more time; in other words we could recess the trial if necessary to have the witness here. But since it would appear that it should not be necessary to actually have these witnesses present, we [fol. 193] will proceed on the theory that you can make your proof in that fashion, and if anything develops we will take care of it.

Mr. Turner: Your Honor mentioned affidavits and photostatic copies of the wires. One or two Commissions, say the Commission up in Michigan or Wisconsin, received those. We have a certified copy of the photostatic copy of the wire received; I take it that would be sufficient.

The Court: I suppose so.

Mr. Turner: Without affidavit; it is certified as a telegram from the files of that particular Commission; probably come within the rules of certified records otherwise.

The Court: Uh huh. I had assumed however that you would attempt to get an affidavit which would also cover the question of actual receipt of the wire.

Mr. German, Sr.: And the time.

The Court: Either a statement that the wire was delivered at a certain time or a statement that the party does not have any recollection or any way of ascertaining the exact time of delivery. In other words, while you don't think it is necessary to make that proof, the defendants apparently

are interested in that proposition and because they are interested in it might want to insist that you have the witness here so that they can examine the witness on that point. So, I think that while we are attempting to dispense with the necessity of having the witnesses present, that you should also cover, in obtaining the affidavits the information that the defendants are interested in. So either have the affidavits specify the time of actual delivery of the wire, or explain why the information cannot be given.

Mr. German, Sr.: That's right.

The Court: Is that what you had in mind?

Mr. German, Sr.: That's right.

Mr. Turner: We will endeavor to obtain the affidavits.

The Court: All right.

[fol. 194] Mr. German, Sr.: Now, I want to say that we think that telegram, and its dispatching, and its receipt by the people to whom it was sent, is irrelevant and immaterial to any issue in the case: and we want to reserve the right to make that objection. And so—any agreements——

The Court: May we not just have this understanding: That on any of this—with respect to any of this proof that the parties defendant reserve the right to object on grounds that the evidence is not material.

Mr. German, Sr.: Proof with reference to this or anything else.

The Court: Yes.

Mr. German, Sr.: Yes, sir, all right.

Mr. Kerr: May I ask Mr. Turner a question?

The Court: Yes.

Mr. Kerr: In referring to these wires you said they were addressed to the parties, or dispatched to the parties. Do you contend that any of those wires were sent to any of the parties in this action, or do you mean the parties to the proceedings in the Federal Power Commission?

Mr. Turner: I mean the persons interested in the Federal Power Commission proceedings. I do not mean to say parties in this lawsuit.

Mr. Kerr: All right, thank you.

Mr. German, Sr.: You do not include the parties to this lawsuit; you do not claim that it was sent to Skelly or Stanolind or Magnolia?

Mr. Turner: No, we don't claim that the wire from Mr. Fuquay was sent to any one of those companies.

The Court: Anything further?

Mr. German, Sr.: One other question, please, about that: I don't know whether I am out of order here or not: that telegram purported to state that on November 30, the Commission had adopted an opinion. Do you agree that it had not done so on November 30th?

[fol. 195] The Court: Isn't that covered by the Fuquay deposition?

Mr. German, Sr.: Is it?

Mr. Black: Yes, he testified it was not.

Mr. German, Sr.: He testified it was not? That answers that question.

Mr. Turner: He testified that the first opinion filed was on a certain date.

The Court: Anything else, Mr. Turner, that you had in mind?

Mr. Turner: We submitted to, say the Skelly Oil Company, a draft of the proposed contract—portions of the draft of the proposed contract between Phillips Petroleum Company and the Michigan-Wisconsin Pipe Line Company, prior to the time that the contract between Phillips Petroleum Company and Skelly was executed. Do you admit having received that draft?

Mr. German, Sr.: We admit having been furnished with a copy of what was represented to us to be a draft, with certain portions of it cut out. Now, the portions cut out we don't know—we didn't know at the time what they were. Do you know what they were?

Mr. Turner: I think one portion—one that I can speak with some confidence of information on, one portion had to do with the price between Phillips Petroleum Company and Michigan-Wisconsin.

Mr. German, Sr.: And another portion had to do—was it with the processing plant Phillips was to build?

Mr. Turner: Now, that part of it I am not sure of. Here was what I was going to ask: Would you have any objection to letting us see the draft of the proposed contract that you actually received and had before you when you executed your contract?

Mr. German, Sr.: No—no.

Mr. Turner: You have that draft, do you?

[fol. 196] Mr. Kerr: We don't have it with us today.

Mr. Turner: You have it at your office?

Mr. German, Sr.: I think we have.

Mr. Turner: You would have no objection to letting us look at that?

Mr. German, Sr.: Not at all.

Mr. Turner: If we so desire you would have no objection to producing that at the trial?

Mr. German, Sr.: Not at all.

Mr. Turner: Now, will the Stanolind Oil Company admit that——

Mr. Campbell: We did not get any.

Mr. Turner: Did you confer with the Skelly insofar as the execution——

Mr. Campbell: I could not answer that, Mr. Turner.

Mr. German, Sr.: I can answer it.

Mr. Campbell: Go ahead, answer.

Mr. German, Sr.: Skelly had no conversation with Stanolind concerning the draft of the contract so far as I am aware, and Mr. Kerr and I were active on behalf of the Skelly in connection with the whole of the Skelly contract.

Mr. Campbell: I can say that the law department had no conference of any kind.

Mr. Turner: Did you see a draft of any portion of the proposed contract?

Mr. Campbell: No, we were not allowed to see it.

Mr. German, Sr.: You are talking about the Michigan-Wisconsin?

Mr. Campbell: Yes, I am talking about the Michigan-Wisconsin.

Mr. Turner: You were not allowed to see it or were you told there was no extra copy at that time?

[fol. 197] Mr. Campbell: I could not say because I was not consulted about it; Mr. Thompson handled that more directly. All I know is, we never had an opportunity over in our department to see the Michigan-Wisconsin contract; the contract we signed was pretty much cut and dried, and was laid on the desk and said, "This is it." "Sign it." Some very slight changes were——

Mr. Turner: How about the Magnolia?

Mr. Moody: We have no information of having ever seen the Michigan-Wisconsin contract, or any proposed copy—or any proposed draft of it. Our understanding, Mr. Turner, is that the proposed—the instrument which was signed was brought to Dallas by a representative of the Phillips Petroleum Company and it was then executed and returned to Phillips and Phillips executed and returned it

to Magnolia; that's all the information I have on the subject.

Mr. Turner: Phillips executed it at Bartlesville and——

Mr. Moody: I don't know where they executed it.

Mr. Turner: Your Honor, we may want to establish this fact: That this line was constructed—the commencement of the construction began on December 12, 1947. The certificate was issued on November 30, 1946. And in that interim period, there was an acute shortage of steel. Michigan-Wisconsin Pipe Line Company went to unusual efforts in order to obtain pipe necessary to commence the construction of this contract or this pipe line. Now, we will be prepared, if need be, to prove that only through unusual diligence in being able to locate and acquire the raw steel, was it possible to have pipe milled in time to commence the construction of this line when it was. Will that be admitted?

The Court: What is the purpose of making that proof—attempting to make that proof? What difference does it make?

Mr. Turner: Well, I said we might probably want to show that; we will want to make full presentation of facts to show that all diligence was exercised on the part of the Michigan-Wisconsin on the construction of the line.

The Court: The pleadings do not indicate any issue on [fol. 198] the question of diligence or lack of diligence of Michigan-Wisconsin in starting construction of the line. They admit that you did start on December 12th, and the fact that you encountered great difficulties, or did not, I cannot see that it has any bearing on the issues of this case. see that it has any bearing on the issues of this case.

Mr. Turner: Well, will the defendants admit that there is no issue on that, Your Honor?

Mr. Campbell: What is that, Mr. Turner?

Mr. Turner: Will the defendants admit that there is no issue on the question whether Michigan-Wisconsin Pipe Line Company exercised diligence in starting the construction of this line when they did?

Mr. Kerr: I don't know.

Mr. German, Sr.: Michigan-Wisconsin did not get any approval of its financing plan until——

The Court: Now, as I understand it, he does not ask you to admit that they did exercise diligence; the question is whether you are going to make an issue, or contend that

Michigan-Wisconsin was not diligent in starting the construction of the line.

My statement was, there is nothing in the pleadings to indicate that you make any issue on that—that you make any contention that they were not diligent in starting construction.

Mr. Black: The issue raised by the pleadings of the Stanolind goes to the point that they were to get certain authorization and consents; and we plead they did not get that.

The Court: I understand that; they were to get approval of the C. E. O., permits from Wisconsin, and that sort of thing, but I don't understand that you raised any question of lack of diligence in commencing of construction of the line.

Mr. Black: I don't understand we have; we do not in the pleadings.

The Court: Do you expect to make any contention that [fol. 199] Michigan-Wisconsin was not diligent in the commencement of construction of the line?

Mr. Campbell: Stanolind does not.

Mr. Black: I don't see how it would be material.

The Court: I don't see how it could be.

Mr. German, Sr.: They did not do it; I think it is enough for us that they did not commence construction until December 12, 1947, without any question being raised as to whether they might or might not have commenced it sooner.

Mr. Moody: Your Honor, there is this point about it: I don't know whether they had the right to start construction prior to December 12, 1947, under what they claim to be a certificate.

The Court: In other words, instead of claiming that they were not diligent, you are inclined to think they might have started prematurely?

Mr. Moody: My contention is that what they had was not a certificate within the meaning and terms of this contract.

The Court: I am under the impression that that is the issue in the lawsuit, and that's all there is to it. But of course there are some angles I am sure that I do not see yet, but I am trying to find out what they are.

Mr. German, Sr.: Tied into this question of the commencement of construction is the approval of the plan of

financing by S. E. C. which not occur until—wasn't it in December, 1947?

Mr. Turner: I think so; we have certified copies of the rules which we will——

Mr. German, Sr.: About in December, 1947, something before they got it; therefore, they could not commence construction until they got that.

Mr. Turner: Well, we will be prepared to prove, Your Honor, that due to the acute shortage of steel that the line could not have been—the construction of this line could [fol. 200] not have been commenced any sooner than it actually was and that it was only through unusual diligence in acquiring the raw steel that it was possible to get the pipe on hand to commence construction when it was.

The Court: Well, why do you think it necessary to make that proof?

Mr. Turner: Well, we don't want to be faced with a contention that—"well, just assuming that you got your certificate when you did, and assuming that we did not have the right to terminate, it at that time, yet we think that we should have some right to get out of our contracts because the Michigan-Wisconsin Pipe Line Company did not start this line."

The Court: They have not attempted to get out of the contract on that ground. If their cancellation that they attempted to make as of December 2 is ineffective, they have not attempted to cancel subsequently. They have got to stand or fall on that attempt at cancellation as I understand it.

Mr. German, Sr.: That is correct.

The Court: They did not send you a telegram on December 20, and say, in addition to grounds heretofore stated as a basis of cancellation, we now desire to cancel for lack of diligence in starting the line. I just can't see that that is in the lawsuit.

Mr. Turner: We will be satisfied on that, Your Honor, if the defendants will agree that that is correct.

Mr. Campbell: Did Mr. Race receive a telegram from Mr. Bullard in answer to this telegram of December 12?

Mr. Turner: Someone, and I can check that for sure.

Mr. Campbell: Did you receive a letter which reiterated Stanolind's position that the contract terminated back when we said we terminated it—we outlined our position completely?

Mr. Turner: We received a reply to our wire from someone from Stanolind.

[fol. 201] Mr. Campbell: All right. Well, that outlined our position completely and it did not raise any new issues.

Mr. Turner: Well, do you agree, Mr. Campbell, that Judge Savage's analysis of the issues in the case of that, this feature which I am discussing and which I say we are prepared to prove, is not an issue in the case.

Mr. Campbell: I say diligence in commencing—when you commenced your construction, does not make any difference.

Mr. Turner: Then you agree that is not an issue in the case?

Mr. Campbell: Yes. Our letter makes that clear. We could not say anything else. If you have that letter, show it to Judge Savage.

Mr. Black: They sent their wire December 12, advising of commencement. We replied by letter that outlines our position.

The Court: Let me ask a question: It looks to me like there is a little too much fencing around here; everybody seems to be afraid to shell down and say what the lawsuit is about.

Will you make the contention on behalf of Magnolia, or do you expect to make the contention on behalf of Magnolia that Magnolia had a right to cancel this contract because of lack of diligence on the part of Michigan-Wisconsin in the commencement of the construction of the line?

Mr. Moody: Let me answer this way, Judge; I am not going to make any contention that the Phillips lacked diligence in attempting to secure steel to build the line.

Mr. German, Sr.: You mean Michigan?

Mr. Moody: Michigan-Wisconsin was guilty of lack of diligence in attempting to secure steel to build the line. I don't know whether Mr. Turner accepts this view of it or not, but my conception of it is that the question here is whether or not there had been issued on or before those telegrams were sent a certificate within the meaning of the [fol. 202] terms of that contract. And I don't see where it is material in any sense whether they were diligent or negligent in their efforts to secure steel or start to build the line.

The Court: Well, now, wait a minute; certainly it is not material if you do not contend that you had a right to cancel because of lack of diligence.

Mr. Moody: In getting steel, I am not going to contend that, no, sir.

Mr. German, Sr.: Well, as I understand it, Phillips, in its contract with Michigan-Wisconsin, had the right to terminate if the construction of the line was not commenced by a certain date. Skelly, and also Stanolind and Magnolia had the right to terminate for that reason if Phillips terminated it. Skelly, Magnolia and Stanolind had the right to terminate their contracts with Phillips, if Phillips terminated its contract with Michigan-Wisconsin, on that ground. But we were not given in our respective contracts the right to terminate on the ground the line was not commenced by a certain date.

The Court: Do I understand from your statement then, Mr. German, that you will not contend that Skelly had the right to cancel the contract with Phillips because of lack of diligence on the part of Michigan-Wisconsin?

Mr. German, Sr.: I would put it this way, Judge: That we did not exercise any right to cancel on that ground I don't know whether we might have had a right, although not in terms given to us, to cancel on that ground; I don't know the answer to that; I haven't ever investigated it. But we did not undertake to cancel because of any such lack of diligence, if there was any.

The Court: And you don't?

Mr. German, Sr.: And I don't see myself how it could be material to any issue in this case as to whether or not Michigan-Wisconsin was diligent or was not diligent, because as you say; we predicated—we say we did terminate these contracts on December 2nd, for an entirely different reason.

The Court: And that is the thing you stand on?

[fol. 203] Mr. German, Sr.: That is the issue in the case.

The Court: That is the thing you stand on—all three defendants in this case?

Mr. German, Sr.: That's right.

The Court: Was your right to cancel on the grounds stated in the telegrams you sent Phillips?

Mr. German, Sr.: That's right.

Mr. Black: And repeated in the December letters.

Mr. German, Sr.: My company did not respond to the telegram; we ignored it because we were not party to the contract.

Mr. Moody: A moment ago I said "these telegrams";

I had reference to the telegrams of December 2nd, 1946; you understood that?

The Court: I understand that. All right, anything further?

Mr. Turner: Your Honor, as I read the answer of Skelly, it does not admit the amount in controversy. Is that an oversight; do you admit the amount in controversy?

Mr. German, Sr.: I think we do without any question. I think it probably involves——

The Court: I think that would have to appear from the evidence, but I think there will be no question but what the Court, in making findings on the evidence presented, will have to find that the suit involves more than $3,000.

Mr. German, Sr.: Parties cannot admit jurisdiction where it does not exist.

The Court: In other words, I think you would have to prove that: I don't think an admission will mean anything.

Mr. German, Sr.: Parties cannot admit jurisdiction where it does not exist.

The Court: Now, is that all that you wanted?

[fol. 204] Mr. Turner: Well, I take it that there is no objection to the form, or the mechanical features of the deposition of Mr. Fuquay, as it has been filed in the case.

Mr. Black: And the certificate?

Mr. Turner: As to the form or manner of taking the deposition, or producing it in Court.

Mr. Black: No objections, except those we saved.

Mr. Turner: That is, just to particular questions or answers?

Mr. Black: Questions that go to the admissibility of the evidence; we raise no question about the certificate—is that right, Mr. Moody?

Mr. Moody: The certificate?

Mr. German, Sr.: You mean the notary's certificate?

Mr. Moody: He is asking if we have any objection to the form or manner of taking, certification to the deposition, and the filing of it with the Clerk; I don't know of any

The Court: Yes, all right. Will you present any additional evidence now at the trial, Mr. Turner, any evidence other than that which you have outlined?

Mr. Turner: Your Honor, right now I don't think of any additional evidence. I am not—I have no desire what-

ever to try to put some evidence on by way of surprise, or the like, but if I should happen to have overlooked something, or in further studying this if we find that there is something that should be put on, I would like to have the privilege of doing it.

The Court: All right, Mr. German, will Skelly have some additional evidence to offer?

Mr. German, Sr.: Well, it will depend on their admissions, Judge. May we proceed?

The Court: Yes, that is what I have in mind.

Mr. German, Sr.: Yes, sir.

The Court: You may ask them.

[fol. 205] Mr. German, Sr.: First, I would like to ask Mr. Turner ir he will admit—I speak on behalf of all three of the defendants in doing this——

The Court: All right.

Mr. German, Sr.: That the telegrams of December 2nd, 1946 to Phillips, were received by Phillips on December 2nd?

Mr. Turner: Yes, sir, they were.

Mr. German, Sr.: And were they received prior to the time when the Secretary of the Commission mailed copies of the order bearing date of November 30, 1946, purporting to issue the certificate, to the parties—mailed it to the parties to the proceeding before the Commission?

Mr. Turner: I tried to ascertain that exact hour and I did not get any convincing showing as to just when that event took place. Do you have any proof on that?

Mr. German, Sr.: Well, we have learned, Mr. Turner, that three of those letters were registered, one addressed to Michigan-Wisconsin, or, it is som-body with it, and another addressed to somebody with the Panhandle-Eastern, and another addressed to somebody with the Michigan Gas Storage Company. Now, you were aware of that.

Mr. Turner: Yes, sir—yes, sir.

Mr. German, Sr.: Because those——

Mr. Turner: We have certified copies of the records of the Federal Power Commission, and those registered letters, which we will introduce.

Mr. German, Sr.: Yes, you put them in as a part of the testimony of Mr. Fuquay, I believe too, did you not?

Mr. Turner: Well, they didn't actually have photostats at the time, but we all agreed that we could obtain photo-

stats and certify them and introduce them in evidence. We have those certified copies.

Mr. German, Sr.: That's right.

Mr. Turner: We will introduce them.

[fol. 206] Mr. German, Sr.: Now, we have learned from the Postoffice in Washington that those registered letters were not received by the Postoffice until at least the earliest hour was 8:45 P. M. of that day, on December 2nd. And more likely, at 9:38 P. M. on that day.

Mr. Turner: At 9:38?

Mr. German, Sr.: 9:38.

Mr. Turner: Eastern Standard time.

Mr. German, Sr.: Yes, sir, Eastern Standard time.

Mr. Turner: May I ask what form of record—do they keep a record of the hour?

Mr. German, Sr.: Well, this mailing—these two mailing papers—registered mailing papers that the Federal Power Commission has—certified copies of which you have and we have, bears a Lock number and a bag number and it lists the three registered letters, and gives numbers to those—to each of those three letters, copy of each of those two documents went with the registered letters to the postoffice, and on it—on those copies they noted the hour of the day—or, it happened to be the hour of the night.

Mr. Turner: Who noted that?

Mr. German, Sr.: Well, it appears to be noted by the Receiving Clerk in the Postoffice; as I read the name it is C. Wahler, W-a-h-l-e-r.

Mr. Turner: Is that a record, Mr. German?

Mr. German, Sr.: Of the Postoffice in Washington.

Mr. Turner: You have a certified copy?

Mr. German, Sr.: A certified copy.

Mr. Turner: Well, we will admit that that certified copy may be introduced in evidence.

Mr. German, Sr.: And it identifies——

Mr. Turner: I would like to have you please—I am perfectly willing to supply you with photostatic copies of these other papers.

[fol. 207] Mr. German, Sr.: Yes.

Mr. Turner: Would you mind furnishing me photostat copy of that?

Mr. German, Sr.: I will photostat this photostat and supply you with a copy.

Mr. Turner: I will appreciate it.

Mr. German, Sr.: You may look at it now for the purpose of agreement.

Now, do you also admit that the three termination telegrams were received by Phillips before notice of the official order, bearing date of November 30, 1946, were handed out to any of the people who were around the office of the Commission awaiting copies?

Mr. Turner: Before I answer that, Mr. German, you say you will also admit, by admission here—by agreement, on the first question you asked me along this line, which was that we would agree that you could introduce certified copies of the records of the Postal authorities for whatever they may show——

Mr. German, Sr.: Oh, you don't admit then that you received the telegrams before the hour stated there in this postoffice record.

The Court: Well, just a minute, let's see if I can clear that up: You will admit that you received the telegrams from the three defendants notifying you of their cancellation of the contract during office hours on December 2nd?

Mr. Turner: Well, the telegram of Skelly shows, received at the Western Union office at Bartlesville sometime after five o'clock. It runs through my mind it is 5:15. I can get the exact minute here. I think it is reasonable to assume that it was delivered within a reasonable time after that.

Mr. German, Sr.: Have you got that telegram?

Mr. Turner: Yes, sir.

Mr. German, Sr.: May we see it?

[fol. 208] Mr. Moody: Mr. Turner, let's see the ones from Stanolind and the Magnolia, please, also.

The Court: Why not file those telegrams, or copies, with the Reporter?

Mr. Turner, Yes, sir, I will be glad—that is, the telegrams that were sent to us.

The Court: Yes.

Mr. Turner: Yes, sir, I will be glad to.

The Court: They will be received as exhibits.

(The instruments referred to were marked for identification as Plaintiffs' Exhibits 1, 2 and 3.)

Mr. German, Sr.: I would like to see—I want to get something else about them.

Mr. Turner: 5:08—it shows 5:08.

Mr. Black: What about the other two?

Mr. German, Sr.: I see from this photostat of the Skelly telegram that it was received at Bartlesville by the Western Union at 5:08 PM on December 2, is that—that is correct, isn't it?

Mr. Turner: That shows 5:08 as I read it there a minute ago.

Mr. German, Sr.: Now, we have got here, Mr. Turner, a report from the Western Union at Bartlesville as to when it was delivered to Phillips, which says it was delivered at 5:09 to the Phillips Company.

Mr. Turner: 5:09.

Mr. German, Sr.: Yes, sir.

Mr. Turner: That is pretty fast.

Mr. German, Sr.: That is what it says.

The Court: I don't believe, that Mr. German.

Mr. German, Sr.: I don't know what time—well, I don't know; it might depend on where the Western Union office is with reference to the Phillips office.

[fol. 209] Mr. Kerr: It is right across the street.

Mr. German, Sr.: If it was right across the street or in the same building it could have been done, I believe—I suppose that is 5:08; it is not very plain. It could have been 5:00 o'clock. Maybe this instead of being 5:08 is even 5 o'clock. The lower half of that "8" is not there. It is just a naught—small "o", instead of a large "O".

Mr. Turner: I think that is an 8.

The Court: Just a moment, gentlemen.

Furnish the reporter with copies of those telegrams; let them be marked as exhibits and they may be received in evidence.

The telegrams will speak for themselves when they arrived in the office.

Did this party write a letter to the Western Union?

Mr. German, Sr.: No, sir, here is a telegram that came collect to the Skelly Oil Company, which says, "Phillips Petroleum Company signed Skelly Oil Company, delivered 5:09 P.M. care of F. E. Rice." There is what it says. And I want to know——

The Court: Will you agree that if—Mr. Turner, will you agree that if the representative of the Western Union at Bartlesville should be called as a witness that he would

testify that the Skelly telegram was delivered to the Phillips Company at 5:09 on December 2nd?

Mr. Turner: They inform me, Your Honor, that after office hours it is delivered to the telephone operator; that is our usual practice up there.

We will agree that it was delivered to—that they would testify that it was delivered to someone with the Phillips Petroleum Company; it was delivered, it is our information that it was delivered; if it was delivered after that hour it would be delivered to the telephone operator, or, it was delivered to the telephone operator. The telegram was delivered to the telephone operator of the Phillips Petroleum Company.

Mr. German, Sr.: At 5:09 PM.?

[fol. 210] Mr. Turner: We will agree that if the witness, the representative of the Western Union were present as a witness he would testify he delivered the copy of the telegram to the telephone operator of the Phillips Petroleum Company at 5:09 on December 2nd.

The Court: All right.

Mr. German, Sr.: Now, will you also admit that after office hours the telephone operator was authorized to receive telegrams addressed to the Phillips?

Mr. Turner: That was the practice.

Mr. Moody: Now, while we are on that subject, Mr. Turner——

The Court: Why not ask him to agree if they will agree that those telegrams were delivered promptly by the Western Union office.

Mr. Moody: I was going to ask if they would agree that they were delivered in a brief time after that.

Mr. Turner, I have here in my hand what the Reporter has identified as Plaintiff's Exhibit 2, telegram from Stanolind Oil & Gas Company to Phillips Petroleum Company, showing it was received in Bartlesville on December 2, 1946, at 9:37 A.M. Will you agree that that telegram was delivered to the Phillips Petroleum Company on or before 9:45 on December 2, 1946?

Mr. Turner: 9:45; how do you fix that?

Mr. Moody: I just allow them about eight minutes to get it over there; I understand it was across the street.

Mr. German, Sr.: Maybe they had one of these pressure chutes.

Mr. Campbell: Off the record, Mr. Turner. They also have a telegram from the operator showing the exact minute of delivery, but I did not bring it over here with me; it is long before 9:45—I can say that to you; I think it is 9:38, one minute after the hour of receipt.

Mr. Turner: We will agree that, when you furnish that [fol. 211] telegram, that the representative of the Western Union, if present, would testify that he delivered the telegram to someone of the Phillips Petroleum Company after the time it states when the telegram was delivered—as I understand it correctly, Mr. Campbell, you say you have a telegram from the operator?

Mr. Campbell: That's right.

Mr. Turner: Stating the time the telegram was delivered. We will agree if the representative of the Western Union were present he would testify as shown by your telegram, which you may produce at the trial.

Mr. Moody: I have here the telegram from Magnolia Petroleum Company to Phillips Petroleum, showing it was received in Bartlesville December 2nd, 1946 at 12:02 P.M.

Mr. Turner: By the Western Union?

Mr. Moody: How's that? By the Western Union?

Mr. Turner: Yes, by the Western Union.

Mr. Moody: Will you agree that telegram was actually received by the Phillips Petroleum Company on December 2, 1946, by 1:00 P.M.—that would allow them 58 minutes to get it over there.

Mr. Turner: Do you have the telegram?

Mr. Moody: I have no such telegram as described by Mr. Campbell.

Mr. Turner: Yes, we will agree to that.

Mr. German, Sr.: Mr. Turner——

Mr. Turner: Yes, sir.

Mr. German, Sr.: This certified photostat copy of the records of the postoffice in Washington, concerning these registered letters, has the hour 8:45 P.M. at the upper right hand corner of the shorter one of the two slips—pages, or sheets. Now, our information is that that was put there by the party from the postoffice who came over to the Federal Power Commission office and received the package containing these registered letters, and that that [fol. 212] is the hour he picked them up at the Federal

Power Commission office and that we could prove that if we would put the witness on the stand.

Now, will you admit that that is the hour that it was picked up at the Federal Power Commission—the hour and minute?

Mr. Turner: Being wholly unfamiliar with that practice, Mr. German, so that there will be no misunderstanding about just what the practice was, would it be much difficulty to obtain an affidavit from the postal authorities, and we will admit that? We will agree that that may be used in evidence the same as though he testified.

Mr. Moody: That presents a practical problem here as the postal rules will not permit a postal employee to testify—he will respond to a subpoena to produce records, but he won't testify, until ordered by the Court to testify; it is practically impossible to get an affidavit of that kind out of postal authorities. The postal rules, in terms, are to the effect, if called to testify he shall read this rule to the Court, and not testify unless the Court orders him to. Your Honor, I take it, has had that experience.

The Court: No, I have not.

Mr. German, Sr.: Well, at any rate, it would require us to get a subpoena duces tecum, and I am not familiar with the rule that Governor Moody has just mentioned, but I do understand that at least it requires a subpoena duces tecum and a whole lot of folderol—I call it "folderol"; from our standpoint it might be deemed that; that we cannot just call him and he will just bring those with him and testify about it.

Now, will you agree that if he were on the stand he would testify that that is the hour?

Mr. Turner: That he received a bag of mail?

Mr. German, Sr.: That he received the package at the Federal Power Commission office.

Mr. Turner: Did you talk to him, Mr. German?

[fol. 213] Mr. German, Sr.: No, but Mr. Stull did for us; he talked to the postal authorities there.

Mr. German, Jr.: We can tell you what the representations are, Mr. Turner.

Mr. Turner: I am wholly unfamiliar with their practice with regard to these notations; I just want to be sure.

Mr. German, Jr.: Here is what he says about it: In the upper right hand corner of the way-bill:

Mr. Turner: Who is this?

Mr. German, Sr.: Mr. Stull.

Mr. Turner: He is an attorney in Washington?

Mr. German, Sr.: Yes, sir. In the upper right hand corner of the way-bill you will notice the notation "8:45 P. M.," which has been encircled. I am informed by officials of the postoffice department that this notation was made by the pick-up messenger at the time that he actually picked up the sealed mail pouch at the rear platform of the Federal Power Commission on December 2, 1946."

Mr. Turner: We will agree that if he were present he would so testify.

Mr. German, Sr.: All right, is that all about that, Jack?

Mr. German, Jr.: And that is the mail pouch with Lock No. B-8743, rotary number 308?

Mr. Turner: Is that the lock and rotary number on which the notation——

Mr. German, Jr.: Yes, it shows on both; it shows both on the Federal Power Commission Company and on the postoffice department's copy.

Mr. German, Sr.: Well, it was the package containing these registered letters we are talking about.

Mr. Turner: Well, we will so agree.

Mr. German, Sr.: All right. Do you agree that—do you admit that the Skelly telegram was received by Phillips prior to the time when the office of the Secretary of the [fol. 214] Commission handed out mimeographed copies of the November 30 order to people that were waiting around there for copies?

Mr. Turner: Prior to the time that the mimeographed copies were handed out to people waiting around the——

Mr. German, Sr.: Around the Secretary's offices for copies —I suppose in the ante-room, or the waiting room.

Mr. Turner: There is an hour's lapse of time there; I could not fix—I could not fix that time that closely.

Mr. German, Sr.: Uh huh.

The Court: Did Fuquay testify in his deposition as to the time he passed out the mimeographed copies?

Mr. Turner: No, sir, he did not.

Mr. German, Sr.: He was not asked about that—I don't think.

Mr. German, Jr.: Yes, he was.

Mr. German, Sr.: Oh, was he?

The Court: Do you know what time he passed out the mimeographed copies?

Mr. Turner: No, sir, I do not. I understand that the mimeographed copies were passed out down in I believe what is called the Public Relations Room, that is, some mimeographed—that is where some of them were passed out. Now, the exact hour of that, Judge Savage, I was unable to establish. You see, the word was received here by the Western Union office at 5:08——

The Court: That is your information as to the time they were passed out?

Mr. German, Sr.: That they were handed out about 6:20 P. M. Eastern Standard Time.

The Court: What is the source of your information?

Mr. German, Sr.: We have two or three witnesses who were there, men who were there waiting for copies. They understood some order was coming out and they were there waiting for copies of it.

[fol. 215] Mr. Campbell: We had a representative there from Saturday morning, the 2nd, inquiring of the Secretary's office to procure copies of this order.

The Court: Uh huh.

Mr. Campbell: He was told it was not ready yet; it was being mimeographed. He kept repeatedly calling—he will testify that they were not issued until sometime after 6:00 o'clock on the evening of December 2nd. That is Mr. Stull.

The Court: Sometime after 6:00 o'clock?

Mr. Campbell: Yes.

The Court: Is he able to fix the exact time, or do you just not remember the exact time?

Mr. Campbell: I think he can tell the exact time, within a matter of a minute or two.

Mr. German, Sr.: Yes, and there are two others who can do the same thing; one of them represented Skelly.

The Court: Do you want those witnesses present or would it be agreeable to have their affidavits filed with the agreement that their testimony would be in accordance with the statements made in their affidavits?

Mr. Turner: Is the witness going to be here anyway? Was your witness going to be here anyway?

Mr. Campbell: No, we would not bring him except for that.

Mr. Turner: It is a question of just 12 minutes, as I understand the time fixed by Mr. German, 12 minutes before the time the telegram shows received by the telegraph office in Bartlesville.

The Court: Yes, sir.

Mr. Turner: They have a wire saying it was received by someone, by Phillips, at 5:08 Central Standard Time; they fix a time here now that is just 11 minutes later.

Mr. Campbell: We will probably bring Stull anyway, because there are some other things he will testify to.

[fol. 216] Mr. German, Sr.: We can have our witness here.

The Court: All right, you better prove it then.

Mr. German, Jr.: We understood it was plaintiff's contention that this order was issued on the 30th, a few minutes might be important.

The Court: I don't know whether it is important or not. You gentlemen seem to attach importance to it.

Mr. German, Sr.: Well, we don't know when the plaintiff will switch his theory concerning the date of this. It now plants its foot firmly on the position that this certificate was issued November 30.

The Court: Yes, sir.

Mr. German, Sr.: Does it in his pleadings and I understand it is still taking——

The Court: It will be understood that you will have to present evidence as to the time of delivery of the order from the——

Mr. German, Sr.: All right.

Now, I suppose you still take the position that the certificate was issued on November 30?

Mr. Turner: Yes, that is the position.

Mr. German, Sr.: You do admit, do you not, that under date of November 31, 1946—that under date of December 1, 1946, you dispatched a telegram to Skelly Oil Company that the defendant pleads in its answer?

Mr. Turner: I believe we plead that telegram.

Mr. German, Sr.: You plead the same telegram?

Mr. Turner: Yes.

Mr. German, Sr.: All right, then it is admitted by the pleadings.

The Court: All right, do you care to ask for any other admissions?

Mr. German, Sr.: Yes, sir. Do you admit that—will you [fol. 217] admit that Skelly Oil Company's management had determined prior to December 1, that if no certificate was issued by December 1, 1946, they intended to serve their termination notice?

Mr. Turner: I don't know when they did that.

Mr. German, Sr.: Well, then you cannot admit that. And if it becomes important we will prove it. Now, that's all on that.

They allege, Your Honor, in their amended—in the amendment to their complaint that the order bearing date of November 30, 1946, purporting to issue the certificate was mimeographed on December 2, 1946, and we admit that. Our answer—we never pleaded—we didn't know at the time we answered, but now we find out that that is the date and we admit that allegation.

The Court: All right.

Mr. German, Sr.: That is, it was mimeographed by the Federal Power Commission at the direction of the Secretary of the Commission, Mr. Fuquay.

Now, I would like to ask them to admit certain other matters, Your Honor.

Do you admit that the authorizations from the State of Wisconsin and the communities proposed to be served by Michigan-Wisconsin in that State, were not obtained as early as December 2, 1946?

Mr. Turner: The authorizations referred to in the order of November 30, 1946?

Mr. German, Sr.: That's right, those referred to in condition numbered 2, or 2(i).

Mr. Turner: Do you mean "B"?

Mr. German, Sr.: Capital letter "B" in parenthesis.

Mr. Turner: Those authorizations were not obtained December 2, *1942*?—

Mr. German: Not obtained as early as that is my question.

[fol. 218] Mr. Turner: Yes.

Mr. German, Sr.: When were they obtained?

Mr. Turner: My last information is that they have not yet been obtained; we have certified copies of the complete proceedings necessary to obtain authorizations referred to there, which is to supply certain localities or municipalities in the State of Wisconsin we have certified copies of those proceedings up to the date of the last certification. It is

expected those authorizations will be handed down momentarily. The last time I checked, which was about a week ago, they had not then been handed down.

Mr. German, Sr.: I see. As to condition (B) (iii), which relates to the approval of the plan of the Michigan-Wisconsin's plan of financing by the Securities and Exchange Commission—I think that has already been covered.

Mr. Moody: Wait a minute, let's find out when that was first obtained.

Mr. Turner: There were two orders of approval entered by the Securities & Exchange Commission. Those were obtained in the month of December, 1947. We have certified copies which we propose to introduce of those orders of the Securities & Exchange Commission.

Mr. Moody: Thank you.

Mr. German, Sr.: I think we can put in evidence certified copies of the orders of the Commission relating—of the Federal Power Commission, relating to the matter dealt with in Condition (v).

When was the lease—when was the agreement between Michigan-Wisconsin and Michigan Consolidated authorizing the lease operation of the facilities referred to in paragraph (a)(ii) approved by the Commission, if at all?

Mr. Turner: There is a certified copy of the lease and agreement referred to in subdivision iv of paragraph (B), on page 4 of the order of November 30, 1946, introduced in evidence—or, that is, attached—identified and attached to the deposition of Mr. Fuquay. Now, the date will show when that was filed. It was filed sometime prior to December 16, 1946.

[fol. 219] Mr. German, Sr.: That "four" is "iv."

Mr. German, Jr.: In connection with the orders of the *Securites* and Exchange Commission, do you have a certified copy of the order of August 5, 1941, of that Commission, under the Holding Company Act, relating to United Light and Railways Company?

Mr. Turner: August—give me that date again.

Mr. German, Jr.: 5th, 1941, that is the order prohibiting the United Light & Railway ever owning—ever financing I believe it *it*, subsidiaries.

Mr. Turner: Not to my *person* knowledge. I will check and see—not to my knowledge we don't have that order; I am not familiar with it.

Mr. German, Jr.: Will you admit on November 30, 1946—

The Court: He does not know anything about it; he can not admit it; you will have to make proof on that.

Mr. German, Jr.: You know of the existence of such an order, don't you?

Mr. Turner: No, I do not; I never heard of it before.

Mr. German, Jr.: We have had some difficulty getting a certified copy because it is out of print, and the Commission moved from Philadelphia back to Washington during the last month, and so we will attempt to get a copy.

Mr. Moody: May I ask the Reporter to read back Mr. Turner's statement about an order made sometime in December?

(Thereupon the Reporter read back as follows: "There is a certified copy of the lease and agreement referred to in sub-division 4 of paragraph "B" on page 4 of the order of November 30, 1946, introduced in evidence, or that is, attached—identified and attached to the depositions of Mr. Fuquay. Now, the date will show when that was filed; it was filed sometime prior to December 16, 1946.")

Mr. Moody: The question was, about that, Mr. Turner, whether or not there had been any order of the Commission [fol. 220] approving that, and if so, when was the order. Can we agree when the order was made?

Mr. Turner: No, I don't—I don't know when the formal order—that is, a written order—it was certainly recognized and approved and considered as having been complied with by all of the—I say, I know of no formal specific order on it. I do not know whether one exists or does not exist. I did not find it on the docket in there. However, in answer to your question there, by the subsequent proceedings, by the proceedings of the Federal Power Commission recognizing the certificate in full force and effect, why, they necessarily recognize that that condition has been complied with, in our view.

Mr. Moody: If the Court please, I am not asking for that sort of admission, but if there is any actual order approving any such lease agreement.

You have no knowledge of any such order having been made by the Commission?

Mr. Turner: A formal specific written order, specifically covering that approval, I do not know of it.

Mr. Moody: Your Honor understands, I take his answer about the Commission recognizing the order and so forth,

as not anything I asked him to admit. I asked him if there was an order, and if so, when.

The Court: Yes, sir, I understood your question. Anything further?

Mr. German, Sr.: Yes, Your Honor. Let me ask Your Honor a question. We have certified copies of certain documents, of certain orders of the Commission, and there is no use to ask him concerning admissions on them—can't we just put them in evidence at the hearing?

The Court: Yes, sir.

Mr. Turner: May I ask what those documents are, Mr. German; may I ask what those documents are?

Mr. German, Sr.: Well, I have reference particularly at the moment, Mr. Turner, to the documents relating to condition 5—(v) "B."

[fol. 221] Mr. Turner: Do you have any documents relating to those, that were identified on the deposition?

Mr. German, Sr.: I don't think so; it is just the action of the Commission on the applications of Austin Field Pipe Line Company, and—

Mr. Turner: Michigan Consolidated?

Mr. German, Sr.: And Michigan Consolidated, for certificates.

Mr. Turner: My question, Mr. German, is this: We identify and make a part of the deposition, records of the Federal Power Commission, pertaining to those two items. Do you have any additional certified copies on those features that you propose to——

Mr. German, Sr.: No, sir, we have no certified copies of any other documents pertaining to those two, that I am aware of.

Now, I want to ask you about condition (vii) on page 5 of the order, bearing date of November 30; that has to do with the filing of a—by the Michigan-Wisconsin of a schedule of rates and charges in a form satisfactory to the Commission. The condition is that unless an applicant submits such a schedule within six months after the issuance of this certificate, quote the words, "after the issuance of this certificate," that the facilities may not be used for the transportation or sale of natural gas.

Now, when was that schedule filed, if at all?

Mr. Turner: That schedule has not been filed according to my understanding. There was an order made pertaining to that condition by the Federal Power Commission, which

is certified to—identified in the deposition and made a part of the deposition, extending the time for the filing of those schedules.

Mr. German, Sr.: You agree, do you not, that on—that effective as of September 11, 1946, the Commission promulgated new rules—new general rules, and rules of practice and procedure, to be effective September 11, 1946.

Mr. Turner: I so agree.

[fol. 222] Mr. German, Sr.: And that among them is rule 13 (b) which relates to the issuance of orders.

Mr. Turner: Just a moment; let me find it, please.

The Court: May it not be agreed that all rules of the Commission pertaining to any issue in the case may be considered by the Court, and you may submit a printed copy of the rules of the Commission.

Mr. Turner: Together with the order adopting the rules.

The Court: Yes, sir.

Mr. Turner: Yes, sir, we will so agree.

Mr. German, Sr.: And the prior rules also, Your Honor?

The Court: That would apply to prior rules insofar as any would be pertinent.

Mr. German: We want no certified copies.

Mr. Turner: No, we have copies here.

Mr. Moody: Those are the printed copies and they are not certified.

Mr. German, Sr.: They are not certified; they may be mimeographed.

Mr. Moody: Anyhow you agree to the mimeographed copies; we have all got the same copies.

Mr. Turner: We have all got the same copies.

Mr. German, Sr.: Okay. Now, you do agree, do you not, that none of these conditions which the Commission attached that are recited in this order of November 30, had been fulfilled or complied with as early as December 2, 1946.

The Court: That is repetitious.

Mr. German, Sr.: You think that is repetitious?

The Court: I think it has been covered.

Mr. German, Sr.: Okay, I didn't know I had made a catch-all——

The Court: Well, you hadn't.

[fol. 223] Mr. German, Sr.: I didn't go down the line on every one of them, Your Honor.

The Court: Well, I think it is covered.

Mr. German, Sr.: Okay, you think it is just admitted that there wasn't any of them——

Mr. Turner: Well, number 1 and number 9—or number 12, pardon me, I am certain that they were complied with.

Mr. German, Sr.: They were conditions subsequent; I am talking about conditions precedent.

Mr. Turner: Well, we don't agree on the use of the term.

Mr. German, Sr.: I don't recall any other.

The Court: All right, do you care to ask for any——

Mr. German, Sr.: I suppose that these admissions that these—concerning all of these conditions are on behalf of all of the defendants.

The Court: Oh, yes.

Mr. German, Sr.: That's all.

Mr. Black: The conditions outlined in the contract.

Mr. Moody: Mr. Turner, this order of December—of November 30, 1946, which you refer to in your—allege in your pleadings was, as I understand, involved in cause number 9,588 in the United States Court of Appeals for the District of Columbia, cause being styled "Panhandle-Eastern Pipe Line Company, a corporation, vs. Federal Power Commission," and also before the Supreme Court of the United States on petition for writ of certiorari, in cause number 147, October term 1947, case being styled "Panhandle-Eastern Pipe Line Company, a corporation, vs. Federal Power Commission." Will it be agreed that printed copies of the petition in the United States Board of Appeals, or I believe they call it instead of petition, answers to objections of petitioner:

Mr. Turner: Called what?

Mr. Moody: I will state it this way. Will it be agreed that printed copies of the various pleadings and briefs and [fol. 224] arguments filed in the Circuit Court of Appeals, and on the petition for writ of certiorari filed in the Supreme Court of the United States, may be admitted in evidence or may without further certificates or proof of them other than that are printed—showing that they are printed copies.

Mr. Turner: We have no objection to the form, if when you introduce them you state that they are printed copies in those cases. However, we reserve the right of course to question their materiality.

Mr. Moody: All right.

Mr. Turner: Pardon me, if I might ask right here, I don't want to appear out of order, but do you propose to introduce decisions or orders of the Courts?

Mr. Moody: The order—the opinion and judgment of the United States Court of Appeals and the order of the Supreme Court denying the petition for writ of certiorari.

Mr. Turner: And also denying applications for stay, both in the Circuit Court and in the Supreme Court.

Mr. Moody: I don't know.

Mr. Turner: You don't know that there was an application for stay filed, and an order was entered denying that application, by the Circuit Court of Appeals?

Mr. Moody: No, I didn't know that. The only orders I know of were the opinion, the order dismissing the petition for review, and the order denying the petition for the writ of certiorari.

Mr. Turner: Well, we can probably get those certified to, if they become material, but if we get photostatic copies or mimeographed copies of the order as put out by the Circuit Court of Appeals, they can be checked of course in the reports, I suppose by someone—will that be sufficient?

Mr. Moody: Yes, if you get copies, if you know they are; I didn't get clearly what those orders were now.

Mr. Turner: There was an application filed in connection with the appeal, which I understand you are referring to, [fol. 225] for a stay of the order of November 30, 1946. There was an order of the Circuit Court of Appeals denying that stay.

Mr. Moody: Oh, I see.

Mr. Turner: Also there was an application, or there was an appeal made, and the certiorari was taken to the Supreme Court of the United States, and there a stay was asked for, and the Supreme Court also denied the stay.

Mr. Moody: Well, I wasn't familiar with any part of that proceedings.

Mr. German, Sr.: Mr. Turner, there is no official report in the Federal 2d or in the Supreme Court reports about those two orders, is there; I don't remember to have ever seen them.

Mr. Turner: I can't say that I have seen them in the actual reports, but it seems to me that the memoranda, in the lawyers' edition carry all the orders—I don't know whether they carry orders denying stay of execution or not, —but anyhow we can furnish copies of those.

The Court: All right.

Mr. German, Sr.: Will you please furnish us copies of those in advance of the trial of this case? I never heard of them.

The Court: All right, anything else Governor?

Mr. Moody: I don't believe I think of anything right now.

The Court: What about you, Mr. Black. Now, do you have anything else on your mind, Mr. Turner?

Mr. Turner: No, sir. I would like to ask this general question.

The Court: All right.

Mr. Turner: Your Honor asked us whether we had any additional evidence, and right now I don't think of any.

The Court: Yes. Do you propose to offer any evidence other than as you have indicated this morning—I direct that question to all defendants.

[fol. 226] Mr. German, Sr.: Well, so far as Skelly is concerned——

The Court: Now, in asking that question I do not intend to imply that you would be precluded from offering any other evidence, but I think both sides are entitled to know just in a general way what the proof is going to be.

Mr. German, Sr.: In view of the fact it is not a commitment on the point, I would say that as far as Skelly Oil Company is now advised it won't have any proof other than what we have indicated we want to make.

Mr. Moody: We will have proof——

Mr. German, Sr.: I mean witnesses—I mean any witnesses.

The Court: I don't know of any oral testimony that is indicated here on behalf of the defendants, except testimony of the witnesses with reference to the time of—that these mimeographed copies of the November 30 were delivered.

Mr. Campbell: I am afraid you misunderstand, because some of our evidence will go to all the things that occurred on the 2nd—inquiries were made.

Mr. German, Sr.: Yes.

Mr. Campbell: Of the Secretary's office, and the replies that we got. The order was not out, or, changes were being made—evidence along that general line.

The Court: Well, that's all right.

Mr. German, Sr.: That's right.

Mr. Moody: And there will be evidence also about what took place in the Commission office on November 30, with

respect to when this order was—which will lead up to the testimony of December 2nd we expect, when this instrument that they refer to as a certificate of convenience and necessity was actually put out and made available.

The Court: Will you have witnesses present to testify on that subject?

Mr. Turner: Would it be out of order, Your Honor, if I ask them who those witnesses would be?

[fol. 227] The Court: No, I was going to ask them what——

Mr. Moody: Mr. Stull will be one; perhaps Mr. Culton will be another.

The Court: Who is Mr. Culton?

Mr. Moody: He is a lawyer from Amarillo who was attorney for the Panhandle-Eastern Pipe Line Company, I believe.

The Court: You expect to have those two witnesses present at the trial?

Mr. Moody: Yes, sir.

Mr. German, Sr.: Then we will have Mr. Ray here; he may cover more than merely the point of the handing out of the mimeographed copies.

The Court: Mr. Ray was your man.

Mr. German, Sr.: Skelly man, yes, sir.

Mr. German, Jr., We may decide it might be necessary to have a witness to prove the applicability of the death sentence order of the Securities Exchange Commission as it related to the United Light & Railways Company, Holding Company for Michigan-Wisconsin, which was the applicant before the Federal Securities & Exchange Commission matter for the approval of this plan of financing. If we are going to have to prove that, that order was applicable to the parties, it may take a witness to do it.

The Court: When do you want to try this case; when can you be ready to try this case?

Mr. Turner: Next week if that would be satisfactory to Your Honor.

The Court: Can the defendants be ready that soon?

Mr. German: How can you get your affidavits that quick, Mr. Turner?

The Court: Can you get those affidavits—can you get those affidavits by that time?

Mr. Turner: Why, yes, sir, I believe I can: did you fix the date?

[fol. 228] The Court: No, I haven't fixed the date; you said next week—can you get those affidavits by next week?

Mr. Turner: I should think by the middle of next week we should be able to.

Mr. Black: I have a couple of cases to argue in the State Court down there next week.

The Court: You do have a couple of cases?

Mr. German, Sr.: I think it would be better to put it a little farther off than that; let us get our breath after this pre-trial conference.

The Court: What about Friday, February 27th; that will be ten days. That would also be next week, I believe—a week from Friday.

Mr. Black: What about setting it around the 8th of March, if Your Honor please.

The Court: I can try the case most any time, but I just want to get to it and dispose of it. Any particular reason to put it off that long?

Mr. Black: Frankly, I have not canvassed my various engagements; I didn't know that the matter of setting it would be discussed today. I would like a little more notice than a week or ten days.

Mr. Moody: I have got some cases set, and I couldn't tell you to save my life when they are. I think I have got them until the week of March 1st or March 8th. Whatever I have got I can arrange to put off.

The Court: What about Tuesday, March 2nd?

Mr. Moody: That ought to be a good day—Texas Independence Day.

Mr. German, Sr.: They will be out of their jurisdiction up here; sounds like a holiday.

Mr. Moody: Ought to be celebrated everywhere, even Oklahoma.

Mr. Black: If Your Honor Please, I don't want to be [fol. 229] contentious about it, but would you be willing to set it for the third instead of the 2nd?

The Court: May I inquire as to the reason for that?

Mr. Black: One reason is, there is very little flying weather; whenever we come up here without coming on the plane we have to use the week-end to get up here on a Tuesday setting. We were able to fly this time. There has been very little flying weather.

Mr. Campbell: You mean it makes you leave home on Sunday?

Mr. Black: Yes, sir, leave home on Sunday at noon. I didn't stand on that; I just advised the Court that that is the situation.

The Court: I have a little conflict on Wednesday. It doesn't make any particular difference to me.

Mr. Moody: Mr. Meyers here, who also represents the Magnolia, has a hearing in Oklahoma City for the 2nd, and that is before the Corporation Commission. But he can make it on the 3rd he says.

The Court: I have an engagement with the dentist at 9:00 o'clock on that morning; you might have to wait on me a few minutes. But we will set it on the 3rd.

Mr. German, Sr.: Judge, are you sure you will be in a good humor after you get back?

The Court: Probably not.

I have two additional briefs that have been filed by defendants, one on the venue question and the other on the Federal question, that were filed with me yesterday.

Mr. Black: May I make this statement, Your Honor, excusing that delay to some extent. That defense covered by the jurisdiction brief was pleaded in our answer that we filed in November, in some detail.

Mr. Moody: Pleaded by both Magnolia and Stanolind.

Mr. Black: It is in the second paragraph of the answer.

The Court: I didn't intend to offer any criticism at all. [fol. 230] Mr. Black: I see. But I agree that it should have been tendered earlier.

The Court: Because if I don't have jurisdiction you should tell me about it at any stage of the proceedings.

Mr. Black: I know, but I——

The Court: I think—and these briefs suggest to me that there is perhaps a serious question of jurisdiction that I had not heretofore considered. Also there is in my mind, after reading this Magnolia brief, a serious question as to whether the Magnolia—whether the Court has venue of the action against Magnolia, or to put it another way, whether the service of process is good in this case on the Magnolia Service Agent under the statute, perhaps turning on the question of whether this cause of action arose in this district or whether it arose in Texas—the cause of action against Magnolia.

I did reach a conclusion in another case where—on a cause of action arising in Texas, that the service of process on the Service Agent of the defendant corporation was not good, on the theory that the authority of the Service Agent was limited to service of process in causes of action arising in Oklahoma.

In this brief it is presented on a little different angle on the question of consent, in other words, you present it more on the venue theory than on the question of the validity of the service of process; and it might apply either way although in the case I have in mind I reached the conclusion that where a cause of action arises out of the State, that is a cause of action against a foreign corporation, that the service of process had on the Service Agent is not good service.

So I would like for Phillips to answer these two briefs.

Mr. Turner: We will be very glad to do so.

The Court: Now, on this venue question, the rule seems to be, that is, I will put—I say, the venue question; it is I think a question also as to whether the service of process is good. The general rule unquestionably is that unless the statute requiring the foreign corporation to appoint a Serv- [fol. 231] ice Agent clearly covers causes of action arising out of the State as well as those arising in the State, or unless the higher Court of the State has so construed the statute to cover causes of action arising out of the State, that his authority is limited to service of process in cases arising within the State.

Now, Oklahoma has never construed this statute on that point so far as I am advised, and in the one case that I referred to, I decided that the service wasn't good. But in that case there wasn't any question but what the cause of action arose in Texas. It is true the Phillips contended in the prior brief filed that really the cause of action arose in the Northern District of Oklahoma. Do you still make that contention?

Mr. Turner: Yes, sir.

The Court: I would like for you to file your response to these briefs in advance of the trial. How much time would you need to do that?

Mr. Turner: We can mail it I should say by next Monday, if that will be soon enough.

The Court: All right.

Mr. Turner: Give us at least over the week-end.

The Court: All right, I will give you 10 days to file those briefs.

Mr. Turner: That will be plenty of time.

The Court: I would like for you to file them as soon as you can. I don't suggest that you take the full 10 days.

Mr. Turner: We will certainly try not to, and I think we can file them before then.

Mr. Moody: Judge, in the Magnolia's answer we renewed our motion as I recall it now to quash the service and also the question of venue, and that brief is intended as an additional argument in support of, as stated there, the motion to quash the service for improper service, for want of venue and jurisdiction over the person.

[fol. 232] The Court: You advance an argument in the brief that may have been suggested in your prior briefs.

Mr. Moody: It was barely mentioned only.

The Court: But you did not stress the point.

Mr. Moody: No, sir, it is an after thought.

The Court: And there may be something to it.

Mr. Moody: I think, Your Honor, there is.

Mr. Turner: There is a difference of opinion.

Mr. German, Sr.: Mr. Moody told me it was a good brief.

Mr. Moody: No, I told you it was a good point; I didn't tell you it was a good brief—I told you it was a good point.

Mr. Turner: Your Honor, may I make just a brief statement on this.

The Court: All right.

Mr. Turner: We want to be perfectly sure that we have not misled anyone as far as our position is concerned, that is the state of the pleadings, as to the order. It is our view that the answer to that feature of the case is that the order was issued on November 30, 1946, and that very clearly they had no right to terminate. Now, that is our —we think that in itself is a complete answer to it. But apparently the defendants take the position that for some reason or other the order was not issued until December 2nd.

Mr. German, Sr.: No, we don't—we say it was not even issuable then, by its terms.

Mr. Turner: Even then. It is our position that that would have been within the time provided in the contract.

The Court: December 2nd.

Mr. Turner: Yes, sir.

The Court: Why do you say that?

Mr. Turner: The contract gives the Michigan-Wisconsin Pipe Line Company on or before December 1st, within which to obtain——

[fol. 233] The Court: You mean December 1st was on Sunday?

Mr. Turner: Yes, sir. And furthermore, Your Honor, so that our position will be fully stated or suggested——

Mr. Campbell: May I ask a question right there: You say that the contract provides—you mean the contract between Michigan-Wisconsin and Phillips?

Mr. Turner: No, sir, I mean the contract between the plaintiff here and with each of the defendants.

Mr. Campbell: You said contract, Michigan-Wisconsin; we had no contract, Michigan-Wisconsin; that is why I am mixed up on it.

Mr. Turner: I say the contract between the plaintiff and each of the defendants here provided that Michigan-Wisconsin Pipe Line Company will have up to and including December 1st, within which to obtain a certificate. But we say, if I may repeat again, that this is merely ancillary to our principal position, that we feel that the evidence and hearing report will conclusively show that the order was issued November 30, 1946.

And then another ancillary position, we do not believe that they can split a day, so as to bring into play the matter of moments or hours of the day, as to which come first. I wanted to state this, Your Honor, so that there will be no question but what we have stated here our position and advised the Court and the parties as to the position we are going to take on those facts, reiterating it, if you please, that we think the answer to it is that very clearly the certificate was issued on November 30, 1946, but if need be, to go into these other two features, we think they also are——

The Court: You would probably make the further contention too then if under the terms of the contract defendants could not cancel until after December 2nd, that the attempted cancellation on December 2nd would be premature.

Mr. Turner: Yes, sir.

The Court: And ineffective for any purpose.

Mr. Turner: Yes, sir.

[fol. 234] The Court: Even if the certificate was not issued on the 2nd.

Mr. Turner: Yes, sir.

The Court: Is that the position you take?

Mr. Turner: Yes, sir—yes, sir, it is.

Mr. German, Sr.: But your company took the position in its telegram dated December 1st that the certificate had issued on November 30th.

Mr. Turner: We still take that position.

Mr. German, Sr.: And our action on December 2nd——

The Court: I am satisfied that when we have the trial of the case and all the evidence is in that it will be necessary for me to take it under advisement and let you file briefs.

Mr. German, Sr.: Uh huh.

Mr. Black: I did not catch that, Your Honor.

The Court: I don't think I will be able to decide the case from the bench; I think when the evidence is all in, on the date of trial, I will have to take it under advisement and let you file briefs.

Mr. Turner: If the Court please, before you adjourn——

The Court: I suppose there will be no objection if I open this deposition and read this stuff in advance of the trial to save time.

Mr. Moody: It is all right.

Mr. German, Sr.: Sure.

Mr. Turner: I would like to have the record show the appearance of Mr. Eugene O. Monnet and Jack Hays as attorneys for the plaintiff, Phillips Petroleum Company in this case.

Mr. German, Sr.: And whom?

Mr. Turner: Of Monnet & Hays.

The Court: This setting on December 3rd, you under-[fol. 235] stand, you won't receive any further notice—I mean March 3rd.

Mr. German, Sr.: You mean March 3rd. What hour?

The Court: 9:30—I had better make it 10:00 o'clock since I have that appointment; I probably can't be here until 10:00 o'clock.

Filed July 23, 1948.

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF TRIAL PROCEEDINGS

Be it remembered that on the 3rd day of March, A. D., 1948, in the above designated Court, sitting at Tulsa,

Oklahoma, the Honorable Royce H. Savage, United States District Judge, presiding, this above-styled and numbered cause came on regularly for trial.

The plaintiff was present and represented by Harry D. Turner, Esq., Don Emery, Esq., Rayburn L. Foster, Esq., R. B. F. Hummer, Esq., H. K. Hudson, Esq., George L. Sneed, Esq., Donald R. Richberg, Esq., Charles D. Shannon, Esq., Eugene O. Monnet, Esq., and Jack N. Hays, Esq., Attorneys and Counselors at Law.

The defendants were present and represented by Wallace Hawkins, Esq., W. R. Wallace, Esq., W. P. Z. German, Esq., John F. Jones, Esq., W. P. Z. German, Jr., Esq., Dan Moody, Esq., Charles L. Black, Esq., Ray S. Fellows, Esq., Donald Campbell, Esq., and L. A. Thompson, Esq., Attorneys and Counselors at Law.

And thereupon the following proceedings were had to wit:

The Court: Phillips vs. Skelly and others; is the plaintiff ready?

Mr. Turner: Yes, sir.

The Court: Is the defendant ready?

Mr. Moody: Yes, sir, the defendants are ready.

[fol. 236] The Court: I don't believe we need an opening statement in the case. The issues have been very well covered heretofore I think.

Mr. German, Sr.: On that, just a moment please, Your Honor, let me speak to Mr. Moody.

Mr. Moody: May it please the Court, Judge German suggests that I state to you that we gathered the impression from one of the statements the Court made on the pre-trial that the Court perhaps thought there was only one question in the case. I think the question the Court mentioned is in the case, but there are others. And as we notice one of the questions we think there are in the case, we will state the questions to which the evidence is directed.

The Court: You might proceed.

Mr. Turner: If the Court please, we desire to introduce into evidence at this time the deposition that has been filed in the case of Leon M. Fuquay, Secretary to the Federal Power Commission, and each of the exhibits identified in the taking of that deposition as attached to the deposition.

The Court: All right.

Mr. Turner: I take it that it will not——

The Court: The deposition will be received in evidence. I have read the deposition. I am going to overrule all the objections noted in the deposition.

Are there any objections to the exhibits, any of the exhibits offered?

Mr. Moody: Do I understand counsel is offering the entire deposition and all exhibits attached?

Your Honor, I had not assumed that it would be introduced in that way, and I don't have in mind the various exhibits, there are so many of them. There are some that we objected to I think at the time, and might we not during the noon hour examine the exhibits and see if there are any of them that we particularly desire to object to, and state the objections after the noon recess?

The Court: Yes, sir, you may do that.

[fol. 237] Mr. Moody: I don't think the rules require the taking of exceptions to orders overruling objections to the admission of testimony, but some Judges do desire that the exceptions be taken. Is Your Honor's practice that the defendants shall, or the party objecting shall or shall not take exceptions.

The Court: It is not necessary to take them; some lawyers do because they have formed a habit and can't get over it. But that's all right.

Mr. Moody: All right, note the exceptions.

Mr. Turner: We offer in evidence what has been identified as Plaintiff's Exhibit 37, being an affidavit of Floyd Green, the Conservation Attorney of the Corporation Commission of the State of Oklahoma, to which is attached a photostatic copy of a telegram of November 30, 1946, from Leon M. Fuquay, to the Corporation Commission of Oklahoma.

The Court: Is there any objection?

Mr. Moody: Yes, Your Honor; we object to that because it is incompetent, irrelevant and immaterial. It is not shown that it was issued on authority of the Federal Power Commission or that it was sent on authority of the Federal Power Commission.

The Court: Objection overruled.

Mr. Moody: Note the exception.

Mr. German: Your Honor, there is that objection applies to the telegram that was attached as one of t exhibits to—to the Commission's filed copy of the telegram attached as an exhibit to Mr. Fuquay's deposition too. Mr.

Turner is apparently going to introduce a lot of similar affidavits or statements to the one he has just introduced, and that same objection would apply to all of them. Is that right, Mr. Moody?

Mr. Moody: Yes, sir. May I look at that telegram again?

Mr. Turner: Yes, sir. I furnished copies of the affidavits and the telegrams to each of the defendant's counsel.

[fol. 238] Mr. Moody: The further objection to this telegram is, Your Honor, to that part of it wherein it is stated that the Commission adopted an opinion and order in docket number G-669, and issued a certificate with conditions to the Michigan-Wisconsin Pipe Line Company; now, particularly with respect to that part of the telegram that states a conclusion—a legal conclusion of the sender of the telegram as to the character and legal effect of the action taken by the Commission, and describes it as the issuance—issuing a certificate. We object to that because it is a legal conclusion and an opinion of the person who sent the telegram with respect to the legal effect of what the Commission had done.

The Court: Overruled.

Mr. Moody: Note the exception.

Mr. Turner: Does Your Honor desire that I read this telegram at this time?

The Court: No, you may just pass it up here.

Mr. Turner: It has just been suggested, Your Honor, that the exhibits attached to the deposition of Mr. Fuquay are numbered 1, 2, 3, 4, and 5, and so forth, on down through 33. So as to avoid confusion it has been suggested that we start numbering these exhibits No. 33 and on.

Mr. German: 34?

Mr. Turner: I think 32 is the last one—or, 34 to be certain of it.

The Court: Then you may change the exhibit numbers of the exhibits offered on pre-trial to 34, 35, and 36, and continue numbering on the trial in sequence.

Mr. Turner: We offer in evidence what has been marked as Plaintiff's Exhibit 38, being an affidavit of Tom McMurray, Secretary of the Corporation Commission of the State of Oklahoma, to which is attached a photostatic copy of a telegram from Leon M. Fuquay, of November 30, 1946, to the Corporation Commission of Oklahoma.

The Court: That same telegram was sent?

Mr. Turner: Yes, sir.

[fol. 239] The Court: That is, the content is the same as that——

Mr. Turner: Yes, sir, it is the same telegram. The two of them had something to do with becoming aware of the telegram. Mr. McMurray explains why in his affidavit, the circumstances under which telegrams are delivered, over a week end.

The Court: All right.

Mr. Moody: Your Honor, I didn't know that he intended to offer and number these affidavits. I know he has a number of them. But I make now the same objection to this Exhibit 38 that was made to Exhibit 37; and it may be understood that the same objection goes to all subsequent exhibits which consist of an affidavit, and a copy of a telegram, of the telegram of December 2nd.

Mr. German: November 30?

Mr. Moody: November 30, 1946 and signed by Leon M. Fuquay, Secretary of the Federal Power Commission.

The Court: It will be understood that you make that same objection, and the objection is overruled.

Mr. Moody: And that we except.

The Court: And Exhibit 38 is admitted.

Mr. Turner: We offer in evidence what has been marked as Plaintiff's Exhibit 39, being a certificate of the Secretary of the Public Service Commission of Wisconsin, to which is attached a photostatic copy of a telegram from Leon M. Fuquay, dated November 30, 1946, to Public Service Company of Wisconsin.

The Court: It is admitted.

Mr. Turner: We offer in evidence what has been identified as Plaintiff's Exhibit 40, being an affidavit of Hannah Kellner, to which it attached a photostatic copy of a telegram from Leon M. Fuquay, Secretary of the Federal Power Commission, dated November 30, 1946, to Miller, Mack & Fairchild, Attorneys, Wisconsin Public Service Corporation.

The Court: It is admitted.

[fol. 240] Mr. Moody: Those are all the same telegram.

Mr. Turner: Yes. We offer in evidence what has been marked as Plaintiff's Exhibit 41, being an affidavit and certificate of Alfred L. Parker, attached to a copy of a telegram from Leon M. Fuquay, dated November 30, 1946,

addressed to Robert H. Batton, care of Messrs. Van Atta, Batton & Harker.

The Court: 41 is admitted.

Mr. Turner: We offer in evidence what has been marked as Plaintiff's Exhibit 42, being an affidavit of Henry M. Bruestle, to which is attached the original telegram from Leon M. Fuquay, dated November 30, 1946, to the City of Cincinnati, Ohio, attention Henry B. Bruestle.

The Court: 42 is admitted.

Mr. Turner: Now, Your Honor, this telegram was sent to us with the affidavit attached, recently. They sent the original telegram and asked if possible that they would like to have the telegram returned for their file. We have here a photostatic copy of the affidavit and telegram which we would like to substitute at this time for the original, if we may.

The Court: All right, you may.

Mr. Turner: We offer in evidence what has been marked as Plaintiff's Exhibit No. 43, being a certificate of a certified copy of a telegram—of a photostatic copy of a telegram from Leon M. Fuquay, Secretary of the Federal Power Commission, of November 30, 1946, to S. E. Campbell, Secretary of the Natural Gas Pipe Line Company of Oklahoma.

The Court: Admitted.

Mr. Turner: We offer in evidence what has been marked as Plaintiff's Exhibit 44, being an affidavit of Dale H. Fillmore, to which is attached a photostatic copy of a telegram from Leon M. Fuquay, dated November 30, 1946, to the City of *Dearmorn*, Michigan, attention Dale H. Fillmore, general counsel.

The Court: It is admitted.

[fol. 241] Mr. Turner: We offer in evidence what has been identified as Plaintiff's Exhibit 45, being the original letter of Lawrence Shaw, addressed to Allen Hiatt, to which is attached a photostatic copy of the telegram of Leon M. Fuquay, of November 30, 1946, to Lawrence I. Shaw, attorney, Northern Natural Gas Company.

The Court: It is admitted.

Mr. Turner: Previously, Your Honor, we had the agreement with counsel for the defendants that we would be permitted to offer into evidence without further proof of the authenticity, of the newspaper, copies, or excerpts from

newspapers, or photostatic copies of pages of newspapers. That is correct, is it not?

Mr. Moody: I think we only waived the proof of authenticity?

Mr. Turner: That's right, subject to their objection as to the competency of the exhibit otherwise.

We offer in evidence what has been identified as Plaintiff's Exhibit No. 46, being the front page of the newspaper, Milwaukee Journal, of Sunday, December 1, 1946, insofar as it covers the matter, or newspaper account of the action taken by the Federal Power Commission on November 30, 1946.

Mr. Moody: May it please the Court, before stating an objection to this Plaintiff's Exhibit No. 46, I would like to add to the objection previously made to the telegrams or copies of telegrams which have been offered, the objection that the telegrams are hearsay as to the defendants in this case.

The Court: That objection is also overruled.

Mr. Moody: Now, the Plaintiff's Exhibit No. 46, the defendants object to, because it is hearsay, it is incompetent, irrelevant, and the action of the Commission, whatever it may have been, cannot be established by things that appeared in the newspaper.

The Court: Going back first to these telegrams, I might say that I assume that these telegrams are not offered as [fol. 242] proof of any facts asserted in the telegrams, but are offered for the purpose of simply showing that the telegrams were sent as a matter of giving notice, and as a means of giving notice to the parties to whom they are directed.

Mr. Turner: That is correct, Your Honor.

The Court: You are prepared to prove the facts asserted in the telegrams by other evidence?

Mr. Turner: Yes, sir.

The Court: And the telegrams are received in evidence for that limited purpose only.

Mr. Turner: Yes, sir.

The Court: Now, what is your purpose in offering Exhibit 46, this newspaper account?

Mr. Turner: The purpose if the Court please, is to establish the fact that the action of the Federal Power Commission on November 30, 1946, was at that time, on that date, released to the press, and it was a matter of public informa-

tion published in the newspapers. We have several of these newspapers.

The Court: Do you offer it for that purpose only?

Mr. Turner: Yes, sir. We are not offering it for the purpose of self-serving declarations or establishing the facts as alleged, or as stated, in the newspaper account, but merely to establish the fact that this account was published.

Mr. Moody: If that is the only purpose of offering it I object to it as immaterial; it is immaterial whether the—that item was published in the newspaper, or was not published in the newspaper; it makes no difference that it was or that it was not published.

The Court: Well, I don't know, frankly, I don't know whether it will be material or not. So I will admit it in evidence and if I conclude that it is not material of course, it won't be considered.

Mr. German: If Your Honor please, is it understood that [fol. 243] objections made on behalf of any one of the defendants is on behalf of all of them?

The Court: Yes.

Mr. German: There are really three separate lawsuits here, in a sense—a real sense.

The Court: Well, we will have that understanding.

Mr. German: All right. Exhibit 46 has been admitted.

Mr. Turner: We offer in evidence what has been marked as Plaintiff's Exhibit 47, being a photostatic copy of page 37 of New York Herald Tribune, of Sunday, December 1, 1946, insofar as it pertains to the newspaper account which is headed, "Texas-Mid-West Gas Line," for the purpose that we offered Plaintiff's Exhibit 46.

Mr. Moody: And we make the same objection to this Exhibit No. 47, as made to Exhibit 46; and Your Honor, may it be understood—I see he has other copies of newspapers here; may it be understood that that objection goes to all?

The Court: Yes, sir.

Mr. Moody: Newspaper clippings or reproductions of newspaper pages.

The Court: It will be so understood and the objection is overruled.

Mr. Moody: Note the exception.

The Court: I suggest you have all these newspapers marked and offered at the same time.

Mr. German: In connection with those newspaper articles, I would like to ask Mr. Turner, what do you claim, Mr. Turner, is the source of the information?

Mr. Turner: Of the newspapers?

Mr. German: Of the newspapers.

Mr. Turner: The Federal Power Commission.

Mr. German: How?

[fol. 244] Mr. Turner: They released to the press on the night of November 30, 1946, the action taken by the Commission—released to the press the information concerning the adoption of the order of November 30, 1946, and the issuance at that time of a certificate of public convenience and necessity to the Michigan-Wisconsin Pipe Line Company.

Mr. German: Well, you are not claiming are you that the reporters were given copies of any order on that date?

Mr. Turner: As to exactly the form in which the reporters and the newspapers were given this information, I cannot state with exactness. As the newspaper accounts reflect, the fact that a certificate had been issued and an order adopted on November 30, 1946, was given to the press by the Federal Power Commission on that date.

Mr. German: Have you any proof of that?

Mr. Turner: The newspaper accounts as well as Mr. Fuquay's testimony as to the practice.

The Court: All right, you may proceed.

Mr. Moody: May it please the Court, I understand here counsel says—he stated a limited purpose for which he is offering these newspaper files, and what is stated in them. Now, I understand that he is offering them to prove that the Federal Power Commission issued a release to—a news release; if he is, we object to it as not the best evidence. The newspapers are not——

The Court: Objection overruled; they will be admitted.

Mr. Turner: We offer in evidence what has been identified as Plaintiff's Exhibits 48 and 49, the first being a photostatic copy of the—of page 12 M of the Washington Post of Sunday, December 1, 1946, insofar as it pertains to the newspaper item headed, "Pipe line authorized." Plaintiff's Exhibit 49 being an excerpt from the Detroit Times of Sunday, December 1, 1946.

The Court: Exhibits 48 and 49 are admitted.

Mr. Turner: We offer in evidence what has been identified as Plaintiff's Exhibit 50, which are certified copies—

[fol. 245] copies certified to by Leon M. Fuquay, Secretary of the Federal Power Commission, of two papers which pertain to the mailing of registered letters by the Federal Power Commission on December 2nd, 1946. These papers being papers referred to in the last portion of Mr. Fuquay's deposition.

The Court: Any objection? Exhibit 50 will be admitted.

Mr. Turner: We offer in evidence what has been identified as Plaintiff's Exhibit 51, being a certified copy of memorandum opinion and order of the Securities & Exchange Commission, dated November 19, 1947, in the matter of the United Light & Railways Company, American Light & Traction Company, et al.

The Court: Any objection?

Mr. Moody: I haven't seen it.

The Court: Exhibit 51 is admitted.

Mr. Turner: We offer in evidence what has been identified as Plaintiff's Exhibit 52, being a certified copy of the findings and opinion, and order of Securities & Exchange Commission dated December 30, 1947, in the matter of United Light & Railways Company, American Light & Traction Company, et al.

Mr. Moody: All right, Mr. Turner.

The Court: Plaintiff's Exhibit 52 admitted without objection.

Mr. Turner: We offer in evidence what have been marked as Plaintiff's Exhibit 53 and Plaintiff's Exhibit 54, the first being a photostatic copy of amendment of an agreement, the amendment being dated September 11, 1946, executed by Michigan-Wisconsin Pipe Line Company and Phillips Petroleum Company. Exhibit 54 being an amendment to an agreement, the amendment being dated October 16, 1946, between Michigan-Wisconsin Pipe Line Company and Phillips Petroleum Company.

Mr. German: What is the date of the first one?

Mr. Turner: September 11, 1946. These are photostatic copies of the copies that I furnished to each of the counsel pursuant to the pre-trial agreement.

[fol. 246] Mr. Moody: Well, Your Honor, I haven't read these. May I look at one of them for a moment?

Your Honor, to Exhibits 53 and 54, and to each of them separately, the defendants make the following objections: That they are hearsay as to each of the defendants. They

purport to attempt—they evidence an attempt on the part of the Michigan-Wisconsin Pipe Line Company and the Phillips Petroleum Company to amend the terms of a contract between the plaintiff, Phillips Petroleum Company and Michigan-Wisconsin Pipe Line Company which is attached to the bill of complaint as Exhibit No. 1, and to that exhibit number—or, as Exhibit A, I believe it is. All right, it is Exhibit No. 1. And to that exhibit are attached Exhibits A, B, and C. They are, instead Exhibits B, C, and D. And those are the contracts which the plaintiff alleges exist between the plaintiff and the several defendants Skelly Oil Company, Stanolind Oil & Gas Company, and Magnolia Petroleum Company—in those three contracts between the plaintiff and the three defendants, reference is made to this contract between the Phillips Petroleum Company and the Michigan-Wisconsin Pipe Line Company. These subsequent agreements evidenced by Plaintiff's Exhibit No. 53 and 54, attempted to change, in material respects, the terms of the contract between Michigan-Wisconsin Pipe Line Company and Phillips Petroleum Company, and to alter the rights and the obligations of the parties under the contracts between the plaintiff and the defendants. We object to them because they are hearsay and could not be binding upon the defendants in this case, immaterial and irrelevant to any issue in the case.

The Court: Objection overruled.

Mr. Moody: Note the exception.

The Court: Exhibits 53 and 54 admitted.

Mr. Turner: If the Court please, we offer in evidence what have been marked as Plaintiff's Exhibits 55 through 68. These exhibits being certified copies of the records before the Public Service Commission of the State of Wisconsin, these exhibits having to do with the steps taken in accord with the order of November 30, 1946, of the Federal [fol. 247] Power Commission pertaining to obtaining or taking steps to obtain approvals from the State of Wisconsin for local activities.

The Court: Well, why is that evidence material in this case?

Mr. Moody: It was agreed, Your Honor, at the pre-trial that the applications had been filed, but that the certificates had not been obtained from the Public Service Commission of Wisconsin.

Mr. German: Or the municipalities.

Mr. Moody: Or the municipalities in the State of Wisconsin. And since the agreement is, as made at the pre-trial, that such certificates have not—or authorizations, whatever they may call for up there—have not been obtained from the State of Wisconsin, or Public Service Commission of Wisconsin or the municipalities, these records we object to as immaterial, irrelevant—not necessary.

The Court: I asked counsel a question; if you will hold up until he answers it, it might have some effect on the nature of the objection you want to make.

On what theory do you consider these exhibits material, Mr. Turner?

Mr. Turner: Your Honor, we take the position that these notices of termination, telegraphic notices of termination which the defendant companies served on Phillips Petroleum Company at Bartlesville, did not terminate these contracts, nor should it be the basis for saying the contracts are terminated, because at that time we had obtained—there had been issued, to the Michigan-Wisconsin Pipe Line Company a certificate of public convenience and necessity; that was done on November 30, 1946. We have the record here as to the action taken by the Federal Power Commission; its order of November 30, 1946, is in itself a complete answer to this attempt on the part of each of the defendants to terminate their contracts. We wanted to show, however, the fact that steps had been taken to comply with all these conditions—not that we think that that is necessary to be shown. For one thing they allege in here that these conditions are [fol. 248] onerous—burdensome. Well, we think that is nothing that they can assert. We think it is not for them to say in an action like this whether they think they are burdensome or onerous or whether they are or are not; it is a certificate, one meeting fully the requirements of the Natural Gas Act, and in turn fully meeting the requirements of the contracts in question. So on our view of this matter these exhibits may be immaterial, but in addition to our position—in addition to what we think is the complete answer to this controversy, we are offering this just to meet the contentions that they might make in that regard.

The Court: I don't see how the evidence could be material. What do these exhibits show, just generally?

Mr. Turner: They show that applications have been filed with the Public Service Commission of the State of Wiscon-

sin to convert in certain localities in Wisconsin, from manufactured gas to natural gas. They show the steps that have been taken in the proceedings, and as a matter of fact they are now down to a point where the authorization of the Public Service Commission of Wisconsin may be expected any day.

The Court: All right, let me hear your objections.

Mr. Moody: We object to that because they are immaterial and irrelevant. As I previously stated. And the other grounds that were stated, and particularly, Your Honor, on the pre-trial it was agreed or stated by Mr. Turner in response to our request for—in our discussions there, that applications had been filed with the Wisconsin Public Service Commission, but that the Commission had not acted upon them; and in view of that it seems to me that this volume of record need not go in the record of the trial of this case.

The Court: These exhibits of course do not pretend to contradict that agreement.

Mr. Moody: No, sir, I understand they do not. I am not intimating that. But I mean, that covers every point that could be material on——

The Court: Let me ask you this question: May it be stipulated that the Michigan-Wisconsin Pipe Line Com- [fol. 249] pany subsequent to November 30, 1946—well, I will put it this way: After December 2nd, 1946, filed a purported application with the Wisconsin-Public Service Commission for the purpose of attempting to comply with the conditions imposed in the order of November 30, 1946?

Mr. German: No, not quite that. As I understand it, Michigan-Wisconsin did not make any effort, is that right? It was perhaps the companies that were rendering service to municipalities in the State.

The Court: That made the applications?

Mr. German: That may have made the applications; I don't know. I haven't seen these documents—we haven't seen them before.

Mr. Turner: Yes, sir, certain distributing companies in the State of Wisconsin were supplying certain municipalities with manufactured gas, gas that they manufactured say out of coke. Now, under the statute of Wisconsin, before those particular municipalities can be supplied with natural gas, why, the Public Service Commission of Wisconsin must authorize the conversion from manufactured gas to natural gas.

The Court: Oh, I see.

Mr. Turner: And that is the authorization spoken of in the provision, in the order of November 30, 1946, that is involved here before the Court.

The Court: It is my present view that so far as this lawsuit is concerned, it does not really make any difference whether plaintiff has complied with any of the conditions imposed in this order.

Mr. German: Right there may I make——

The Court: But I may have a different view of it——

Mr. German: Yes, sir.

The Court: Before I get through.

Mr. German: May I make a remark on that?

The Court: All right.

[fol. 250] Mr. German: That gets down to one of the points we make—the defendants make. We say that the findings in this November 30 order, and the conditions that were attached to the purported issuance of a certificate, shown on their faces that the Commission—the Federal Power Commission was wholly without any authority to issue the order of November 30; that it is wholly void—utterly void because the Natural Gas Act conditioned its granting of a certificate to anybody—any applicant, on its first—on its first making findings of ability to render the service and perform the acts it sought authority to perform and render, and that the public convenience and necessity required the rendition of the service; that otherwise the Act commands it to deny the application. Now, getting down to this specific point of the condition relating to obtaining authorizations and permits from authorities in Wisconsin, without those permits and authorities, the applicant has not shown that the Public Service requires—Public Service and convenience requires the rendition—that the public convenience and necessity require the rendition of the service, and the Commission in this very order found that without those authorizations and without the approval by the Securities & Exchange Commission of the plan of financing the project proposed by the applicant could neither be financed, constructed, nor operated. So we make a point there, and in connection with other of the conditions, that the Commission was utterly powerless to grant a certificate to Michigan-Wisconsin at the time it undertook to do so on November 30, 1946.

Then we also make the point——

The Court: Now, just a minute.

Mr. German: Yes, sir.

The Court: I don't want to argue the case yet; I don't want to hear argument on the case yet.

Mr. German: Well, I know——

The Court: What is your conclusion as to the materiality of the evidence disclosed by these exhibits?

Mr. German: Well, there is only one point about it, and [fol. 251] that is covered by the agreement, that they had not obtained those authorizations or permits when the termination notices were served, and have not yet obtained them. And that is covered by the agreement at the pre-trial conference.

Now, I think we would be willing to agree that appropriate companies did subsequent to December 2—I don't know when then commenced it—seek the authorizations to change over from manufactured gas to natural gas. They did seek it, but they have never obtained it. I think it is perfectly appropriate to agree to it. We haven't seen them.

The Court: I am going to overrule the objection; they will be admitted. I don't think this evidence is material to any issue in the case. As I have said, my present view is that it is not going to be necessary to be concerned with what actions have been taken since December 2, to comply with conditions imposed in the order of November 30.

Mr. German: Yes, sir.

The Court: The question here is whether the November 30 order constituted the issuances of a certificate.

Mr. German: Yes, sir.

The Court: And what may have been done by way of complying with conditions imposed in that order since the date upon which these defendants sought to cancel the contract on the theory that there had been no certificate issued by the Commission or before December 1, it seems to me is immaterial. But conceivably it might become material. I will let it go in for whatever it may be worth. Of course, if I conclude, as I think I shall, that the evidence is not material, it won't be considered.

Mr. German: Yes, sir.

The Court: Perhaps the easiest way to proceed is to let them go in, and then later determine——

Mr. German: Yes, sir. I am not meaning to argue at all. I am—in what I have said before, we wish to suggest

to you other points we were making other than this mere one point that this November 30th order was not issued on December 2nd in the formal sense, of compliance with [fol. 252] rule 13-B, and I have stated one of them and I want to state another one without any argument.

This certificate—purported certificate on its face was not subject to be issued until the provisions of paragraph C of it—the conditions contained in paragraph C of it, were met. That is, the supplemental order issued, and the opinions issued; and so it could not have been issued on December 2 in any event. And then there are other conditions to it—attached, which we say would have had to be complied with before a certificate could have been issued, as such, at all.

The Court: It may be worth while for you gentlemen, all of you, to understand now, that the procedure I expect to follow in this case is, to have you put in the evidence at this hearing, and then I am going to ask you to file briefs, and as soon as the briefs are filed, I will then set the case for oral argument. I want to read your briefs before I hear the oral argument. One reason I want to do that is because there will be a great many exhibits in evidence and I think it would be quite helpful to me to have your briefs wherein you will of course call attention to the specific provisions of any exhibits to which you attach significance. And then I can consider these exhibits with reference to the portions of them—that is the content of the exhibit, to which you attach some significance, and in connection with the express purpose for which the exhibits are offered. So you will have the opportunity to brief all these questions before oral argument and also to present oral argument before I attempt to decide the case.

Mr. Moody: Note our exception to the order overruling the objection.

Mr. Turner: We offer in evidence what has been marked as Plaintiff's Exhibits 69, 70 and 71, Plaintiff's Exhibit 69 being a certified copy of the appointment of a statutory service agent of Stanolind Oil & Gas Company of Delaware—Exhibit 69 being the appointment of a statutory service agent of Stanolind Oil & Gas Company; Plaintiff's Exhibit 70 being a certified copy of the appointment of a statutory service agent of Skelly Oil Company; and Plaintiff's Exhibit 71 being a certified copy of the appointment

[fol. 253] of the statutory service agent of the Magnolia Petroleum Company.

The Court: They may be admitted.

Mr. Turner: I would like to call at this time, Your Honor, Mr. Reid.

The Court: All witnesses who will testify in the case, please stand and be sworn.

(Thereupon the witnesses were sworn by the Clerk.)

The Court: Is Mr. Reid your first witness?

Mr. Turner: He was intended to be, Your Honor; I understand he just stepped out a moment. We have another witness that we are prepared to prove by that the contract between Phillips Petroleum Company and Stanolind Oil & Gas Company that is involved in this case was executed by Stanolind Oil & Gas Company at Tulsa, Oklahoma, and was executed by Phillips Petroleum Company in this the Northern District of Oklahoma.

Mr. Campbell: There is no controversy over that.

Mr. Turner: Will you admit that?

Mr. Campbell: Why, certainly.

Mr. Turner: Thank you. We have a witness to prove that the contract between Phillips Petroleum Company and Skelly Oil Company, dated December 5, 1946, was executed by Skelly Oil Company and by Phillips Petroleum Company in Tulsa and Bartlesville, in the Northern District of Oklahoma. Will you admit that, or——

Mr. German: Yes, yes.

Mr. Turner: Now, through Mr. Reid we are prepared to prove that the contract between Phillips Petroleum Company and Magnolia Petroleum Company was executed in this manner: The contract was taken unsigned by Mr. Reid, who is an employee of Phillips Petroleum Company, to the offices of the Magnolia Petroleum Company at Dallas, Texas. There the contract was signed by the officers of Magnolia Petroleum Company. It was taken back by [fol. 254] Mr. Reid to Bartlesville, Oklahoma, for signature or execution there on behalf of Phillips Petroleum Company with the understanding that when the contract was executed by Phillips Petroleum Company it would be—an executed copy of the contract would be placed in the mails and mailed back to Magnolia Petroleum Company at Dallas. Do you admit that?

The Court: Was that done—and that was done in accordance with the agreement?

Mr. Turner: And that was done, yes, sir.

Mr. Moody: We admit that the contract was brought to Dallas and signed there by an officer of the Magnolia Petroleum Company and delivered to a gentleman representing the Phillips—the Phillips Petroleum Company, and subsequently a copy—a copy of the contract was received out of the mails, executed by an officer of the Phillips Petroleum Company—and I admit that the Phillips signed in Bartlesville, or in the Northern District of Oklahoma, but I—I know of no agreement that—there was a copy to be returned, but I know of no agreement that it was to be returned through the mails.

The Court: Well, will you agree that if Mr. Reid were called he would testify as stated?

Mr. Moody: I would like to know who he had the agreement with.

The Court: What difference does it make?

Mr. Moody: Your Honor, I may want to offer some testimony on it.

The Court: Well, let me finish my statement.

Mr. Moody: Pardon me.

The Court: You apparently agree that the contract was handled in the way counsel states that it was; what difference does it make whether it was done that way pursuant to an understanding or just happened that way?

Mr. Moody: Well, if he will eliminate that it was the agreement, why, it is satisfactory to me.

[fol. 255] The Court: Well, will you eliminate that, Mr. Turner?

Mr. Turner: Well, Your Honor——

The Court: It makes no difference what your agreement was as to how it was to be done; the important thing how it actually was done. You have agreed on that; isn't that sufficient?

Mr. Turner: Well, I wanted to bring out, if the Court please, the fact that pursuant to that understanding there, it was agreed that the mail could be used—understood that the mail could be used to return the contract to Magnolia.

The Court: Well, call your witness; we can prove it before we can agree on it.

R. P. Reid, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Mr. Turner: Mr. Reid, were you sworn?
The Witness: No.
Mr. Turner: You were out of the room; raise your right hand and be sworn.

(Thereupon the witness was sworn by the Clerk.)

Direct examination.

By Mr. Turner:

Q. State your name to the Court please.
A. R. B. Reid.
Q. By whom are you employed?
A. Phillips Petroleum Company.
Q. Did you have anything to do with the matter of the execution of the contract between Phillips Petroleum Company and Magnolia Petroleum Company?
A. I did, sir.
Q. Dated December 5, 1946, that is involved in this case?
A. I did, sir.
Q. Did you take it to the Magnolia Petroleum Company?
A. I did.
Q. Dallas, Texas?
A. Dallas, Texas.
Q. Was it signed by Phillips Petroleum Company at that time?
A. It was not.
[fol. 256] Q. State to the Court what took place there as to the execution of the contract, or any conversation about—if any, of returning an executed contract to the Magnolia Petroleum Company.
A. I called on the Magnolia at Dallas, Texas. Mr. R. D. Henley, with two copies of the contract that had been negotiated to a large extent, for the Magnolia Petroleum Company's execution. I remained in Mr. Henley's office until it was properly executed. I brought the copies back to Bartlesville, we executed the copies, and I returned by —through the mail, to Mr. Henley, an executed copy.
Q. You say "we" executed the contract, that is——
A. Phillips Petroleum at Bartlesville, Oklahoma.
Q. And it was executed in Bartlesville, Oklahoma, after Magnolia——

A. Had executed it in Dallas, that's right, sir.

Q. Now, you say you returned it, an executed copy in the mail, to Magnolia Petroleum Company?

A. That's right, sir.

Q. Was that, or was that not, pursuant to any understanding you may have had with representatives of the Magnolia?

A. Well, I was——

Mr. Moody: Just a minute; I object to that as calling for an opinion and conclusion of the witness, whether pursuant to an understanding.

The Court: Sustained. You can ask him another way.

By Mr. Turner:

Q. Was—state what, if anything, was said relative to Magnolia receiving and executing a copy of the contract?

A. Well, it was this: I told Mr. Henley, upon Magnolia's execution, I would take it immediately to Bartlesville for Phillips Petroleum's execution, and that I would return their copy, executed copy, through the mail.

Q. And you did so return it?

A. I did so return it.

Mr. Turner: That's all.

Cross-examination.

By Mr. Moody:

Q. Are you sure you said that "I will return an executed copy through the mails," or, "I will just return an executed copy."

A. Well, that is a little delicate——

[fol. 257] Q. All right, you just don't know, do you?

A. Well, I should say that I probably did.

Q. All right, but you don't know whether you did or not, do you, Mr. Reid?

A. I would say, yes.

Q. You would say yes; you know—is there anything that particularly fixes that in your memory?

A. Well, I was in Dallas, and I certainly did not intend to bring the contract back after execution by the Phillips, myself, so I undoubtedly told Mr. Henley that it would be returned through the mail.

Q. Well, do you mean—are you certain that you said, "It will be returned through the mail," or that, "I will return a copy to you," and stop right there?

A. I think, through the mail.

Q. You think, through the mail.

Mr. Moody: All right, that's all.

Mr. Turner: That's all, Mr. Reid, unless the Court has some questions?

The Court: No, I don't have.

Mr. Turner: Mr. Hiatt.

ALLEN B. HIATT, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

By Mr. Turner:

Q. You have been sworn have you, Mr. Hiatt?

A. Yes, sir.

Q. State your name to the Court, please.

A. Allen B. Hiatt.

Q. What is your occupation, Mr. Hiatt?

A. I am an engineer employed by Phillips Petroleum Company at Bartlesville as a staff director in the gas division of the natural gasoline and gas department.

Q. And approximately how long have you been an engineer connected with the natural gas business?

A. With that particular phase of the business approximately seven years.

Q. You are familiar with the acreage, the gas acreage [fol. 258] covered by the contracts with each of the defendant companies that are involved in this case?

A. Yes, sir.

Q. State the amount that will be paid by Phillips Petroleum Company to each of the defendant companies, for the gas that each of those defendant companies is to supply under the terms of its contract with Phillips Petroleum Company if that contract is complied with according to its terms.

Mr. Moody: Just a minute——

Mr. Turner: I will put it this way:

By Mr. Turner:

Q. Will the amount—pardon me, if you will let me reframe my question—will the amount that the Phillips Petroleum Company will pay to each of the defendant companies for the gas covered by its contract with Phillips, substantially exceed the sum of $3,000?

A. Yes, sir.

Q. Will the difference between the amount that Phillips Petroleum Company will pay each defendant company under its contract for that defendant company's gas, and the amount that Phillips Petroleum Company will receive for that gas, will that substantially exceed the sum of $3,000?

A. Yes, sir.

Q. Will that difference substantially exceed the sum of $3,000 if you deduct from that difference the cost and expense to Phillips Petroleum Company of gathering, processing, and marketing the gas, taking into consideration any revenue that the Phillips Petroleum Company may derive in the processing of the gas, such as extraction of liquid hydro-carbons?

A. Yes, sir.

Q. That net profit, reduced to its present worth, does that substantially exceed the sum of $3,000?

A. Yes, sir.

Q. Was that true on July 15, 1947?

A. Yes, sir.

Q. Is the value of each of these contracts with each of these defendant companies, to Phillips Petroleum Company, substantially in excess of $3,000?

A. Yes, sir.

Q. Was that true on July 15, 1947?

A. Yes, sir.

Q. Now, to make sure Mr. Hiatt that I have framed my questions properly, what you have said in the answer to my questions pertains to each of the defendant companies [fol. 259] under each of their respective contracts, is that correct?

A. Individually, yes, sir.

Mr. Turner: You may cross-examine.

Mr. Moody: No questions, Your Honor.

The Court: All right, that's all.

PROCEEDINGS SUBSEQUENT TO PLAINTIFF'S TESTIMONY

Mr. Turner: Your Honor, I think that completes our case in chief.

The Court: Does the plaintiff rest?

Mr. Turner: We would like—if it would be possible we would like to have a five minute recess, if that would be agreeable with the Court.

The Court: All right, I don't mind.

(Thereupon a recess was taken and thereafter, with all parties present as before the recess, the Court reconvened and the following proceedings were had to wit:)

Mr. Turner: At the pre-trial conference an inquiry was made of Skelly Oil Company, Mr. German, relative to a proposed draft of a contract between Phillips Petroleum Company and Michigan-Wisconsin Pipe Line Company, that was given to the Skelly Oil Company, prior to the time that Skelly Oil Company executed its contract with Phillips Petroleum Company; and we asked that that draft be produced. Do you now have it, Mr. German?

Mr. German. Yes, I have it. It was—there was cut out of it—it was a mimeographed copy of a draft, so you told us, of a proposed contract between Phillips Petroleum Company and Michigan-Wisconsin Pipe Line Company, and before you would hand it to us, you or your people there—you were not present Mr. Turner,—you did cut out of it, portions of it, and so we were not allowed to see those portions. We were allowed to see the rest.

Now, I want to explain to the Court that this which I have has since been marked up a little, but this memorandum I put on the cover page here explains it all, and your [fol. 260] people saw that. Did they tell you about it? They came to my office and saw it recently.

Mr. Turner: They saw the contract, I understand yes.

Mr. German: Well, they saw this that we are talking about—not the contract, but——

Mr. Turner: The memorandum.

Mr. German: No, they saw the thing they gave us on November 6, which was lacking one day of being a month—it was one day less than a month prior to the date of the execution of the contract that was prepared to be signed by Skelly and Phillips.

Mr. Turner: Yes, I understood that they saw that contract, Mr. German.

Mr. German: And they saw this memorandum attached to it which was not on it when you handed it to us.

Mr. Turner: Yes, I understand they did.

Mr. German: And you also realize that the portions you cut out, or they cut out before handing this to us now particularly in typed form in it, and not mimeographed, but original typewriter, now, when I hand it to you I can't hand it to you in any other form than that that I have just talked about.

Mr. Turner: Thank you.

Mr. Moody: As to defendants Stanolind Oil & Gas Company and Magnolia Petroleum Company—he has not offered it.

Mr. Turner: We offer in evidence what has been identified as Plaintiff's Exhibit 72, being the draft of the contract which Mr. German has just referred to, and that the memorandum that he has referred to that is attached to the draft explaining certain changes that now appear in the draft——

Mr. German: We on behalf of the Skelly Oil Company, Your Honor, we object to it as being irrelevant, incompe-
[fol. 261] tent and immaterial. I don't see any point in it. I don't see what purpose it could be offered for.

The Court: What is the purpose, Mr. Turner?

Mr. Turner: In this contract, Your Honor, the proposed contract between Phillips Petroleum Company and Michigan-Wisconsin Pipe Line Company that was delivered to Skelly before they executed their contract with Phillips Petroleum Company, it was provided in substance this: That Phillips Petroleum Company would have the right to terminate its contract with Michigan-Wisconsin Pipe Line Company upon the happening of certain events, such as the failure to begin construction at a certain date, *failure to begin construction at a certain date, failure to* failure to begin operations at a certain date, or the failure to obtain from the Federal Power Commission on or before a certain date a certificate of public convenience and necessity —that was, they had the right to terminate, to exercise the option to terminate upon those contingencies. Then it goes further and provides—this draft, that Michigan-Wisconsin Pipe Line Company shall have the right to terminate upon certain contingencies, one of those contingencies being

that if the Federal Power Commission did not issue a certificate of public convenience and necessity on or before a certain date, that Michigan-Wisconsin Pipe Line Company would have the right to terminate, and it also provided that if the Federal Power Commission did issue a certificate, but that that certificate had conditions unacceptable to Michigan-Wisconsin, that then Michigan-Wisconsin could terminate this contract. Now, we think that that makes it abundantly clear that insofar as Skelly was concerned that they very definitely had in mind the conditions, and that insofar as conditions were concerned it was just a matter of whether or not those conditions could be acceptable to Michigan-Wisconsin Pipe Line Company, not to anyone else.

It is, Your Honor, an item of evidence that we think bolsters our answer to any contention that these defendants may have or that this defendant may have relative to what they say they intended concerning the imposition or lack of imposition of conditions. We say that under our [fol. 262] contract with them, that is under the contract between Phillips Petroleum Company and Skelly Oil Company and each of these other defendant companies, that it is perfectly clear that a certificate with conditions in it met fully the requirements of the Natural Gas Company in determining the contract with each of these defendant companies. We offer this as an additional circumstance that we think bolsters definitely the position that we take that it was recognized that conditions would be imposed, and it was merely a matter of whether or not the Michigan-Wisconsin Pipe Line Company was willing to accept those conditions. Furthermore, there is a provision in this proposed draft of the contract which we think clearly shows the parties were not talking about the final certificate at the time of issuance, specifically referring to what would happen in the event there were an appeal. Now, we take the position that our contract with Skelly, and with the other two defendant companies—those contracts are, we say, perfectly clear on that feature. But in addition to that, we offer this as an additional circumstance clearly showing that that was brought to the attention of Skelly directly.

The Court: The exhibit will be admitted then.

Mr. German: Now, if Your Honor pleases, the termination provisions contained in this proposed contract between Michigan-Wisconsin and Phillips Petroleum Company are set forth literally in the preamble or terms of the contract

between Skelly Oil Company and Phillips Petroleum Company—both sets of termination provisions—those giving Phillips the right to terminate its contract with Michigan-Wisconsin in certain eventualities, and those relating to the right of Michigan-Wisconsin to terminate its contract with Phillips in certain eventualities. They are copied literally. And so it is in the case of the contract between Phillips and Stanolind and the contract between Phillips and Magnolia. So this serves no purpose except to prove that those representations were truthful. But that is proof—those representations of Phillips concerning those termination provisions in its contract with Michigan-Wisconsin. But that is proved already because they are in the finally [fol. 263] executed contract between Phillips and Michigan-Wisconsin. So this adds nothing whatsoever to the proof on the point.

The Court: It may not add anything, but I am going to admit it. Objection overruled.

Mr. Moody: May it please the Court, for the Magnolia——

The Court: Of course it will be considered in evidence against the Skelly only.

Mr. German: Then there goes with it that memorandum I attached.

The Court: It could not be considered as against the other defendants.

Mr. Moody: Against Magnolia or Stanolind; there is no need to make an objection then.

Mr. German: May I ask leave of the Court, since this is going in evidence, to borrow it from the Reporter to have it photostated; we have no other copies of it.

The Court: Yes, you may do that.

Mr. German: At least Skelly's counsel will need it in connection with the briefing of the case.

The Court: Yes, sir.

Mr. Turner: Your Honor, so as to make it certain that there is no question about the record, we would like to ask each of the defendants if they will admit that the telegrams which they sent to Phillips Petroleum Company on December 2nd, 1946, those telegrams being identified in the complaint and also having been identified at the pre-trial conference, is it admitted by each defendant that its telegram of December 2nd, 1946, was delivered to Phillips Petroleum Company at Bartlesville, Oklahoma.

Mr. Black: It is admitted by Stanolind.

Mr. Moody: It is admitted by Magnolia.

Mr. German: And by Skelly.

Mr. Moody: In connection with that, Mr. Turner, can [fol. 264] it not also be admitted that each of the defendants affirmed that telegram by letter addressed to the Phillips, at Bartlesville, Oklahoma.

Mr. Turner: I don't understand that to be the case. I don't understand that to be the case, Mr. Moody.

The Court: At any rate, it is admitted by Phillips that those telegrams were received.

Mr. Turner: Admitted by Phillips that they were received, yes, sir.

Mr. German: I want to correct a statement I made, if Your Honor please.

The Court: All right.

Mr. German: I said that the Skelly-Phillips contract contained a copy of the provisions in the proposed contract between Phillips and Michigan-Wisconsin, concerning the right of Michigan-Wisconsin to terminate it in certain eventualities. I am in error. They are not in there.

The Court: I see.

Mr. German: And they are not in the contracts with Stanolind or Magnolia.

The Court: All right.

Mr. German: And while we are at it, in Mr. Lindsay's (the Court Reporter) transcription of the pretrial conference notes he recorded my son as making some statements. Those statements were made by John F. Jones instead of my son, and Mr. Lindsay wants to correct them, but he cannot draw in all the copies he has sent out, so we are putting it in this record. That is a little agreement Mr. Lindsay and I had.

The Court: Does the plaintiff rest?

Mr. Turner: That is, as I understood, you are not sure that it was Skelly that confirmed——

Mr. German: I haven't said anything about that.

Mr. Turner: Well, what was it?

[fol. 265] Mr. German: I have been talking about a mistake I made, and a mistake Lindsay made.

Mr. Turner: I understand, Your Honor, that one of these defendant companies may have confirmed by letter according to our information their wire in answer to a question

that was asked by Mr. Moody. We will check that to make certain which one it was and then we will have no objection to making that admission. I made the statement in answer to Mr. Moody's request to me as to whether or not it would be admitted that all of the defendants confirmed their telegrams by letter.

The Court: By letter.

Mr. Turner: I understand one of them may have.

Mr. Campbell: Will you admit Stanolind did?

Mr. Turner: No, I say, we have to check and see which one of the three confirmed by letter. I think it was Skelly Oil Company, but we want to be certain about it.

Mr. German: I know Skelly did, if that will help you any.

The Court: Does the plaintiff rest?

Mr. Turner: Yes, sir, plaintiff rests?

Mr. Moody: Shall we proceed Your Honor?

The Court: Yes, sir.

Mr. Turner: In that regard, about our admission, Your Honor, it was Skelly Oil Company, we admit that they confirmed their wire on December 2, 1946, by letter.

Mr. Moody: If it please the Court, I notice it is 15 minutes 'til 12; I suppose Your Honor usually adjourns at 12 o'clock.

The Court: Yes, sir.

Mr. Moody: The Court has admitted depositions and exhibits attached. We had prepared here a rather formidable bunch of exhibits, and a good many of them are in the deposition; and if Your Honor will take a recess now in order that we might pull from our—what we propose to [fol. 266] introduce those which are included in the deposition, I expect we will save some time.

The Court: Avoid duplicating some exhibits?

Mr. Moody: Yes, sir, avoid duplication.

The Court: All right.

Mr. Moody: And also this afternoon we would state our objections to such exhibits as were attached to this deposition as we care to.

The Court: All right, we will take a recess at this time until 1:30.

(Thereupon a recess was taken until 1:30 o'clock P. M. on the same day, to-wit, March 3, 1948;

And thereafter and at said hour and upon said date, with all parties present and represented as before the recess, Court reconvened and the following proceedings were had to-wit:)

The Court: All right, you may proceed.

Mr. Moody: May it please the Court, we would like to make a motion at this stage of the case. It is not reduced to writing, and the—as I understand the rules perhaps contemplate that motions will be in writing. We just haven't had time to, Your Honor. May it be reduced later on—if stated to the Court Reporter, and reduced to writing later?

The Court: I understand that it is proper to make motions orally at this stage of the case.

Mr. Moody: All right, then. The motion is made under rule 41-B, and without waiving the right to offer evidence on the part of either of the defendants in the event the motion is not granted. The motion is, Your Honor, to dismiss because the testimony presented by the plaintiff does not raise any question or any issue that calls for the application of any Federal law, either the Constitution of the United States or any Act of Congress, for the decision of the question. In other words, that the testimony presented by the plaintiff does not raise a Federal question. The sum and substance of the plaintiff's testimony is to show [fol. 267] a contract—contracts between the plaintiff and these defendants, some actions and orders of the Federal Power Commission, and then to show telegrams sent by the defendants terminating the contracts; and they have presented no evidence that shows the existence of any issue to be ruled by Federal law.

The Court: Motion is overruled.

Mr. Moody: To which the defendants except.

Now then, Your Honor, during the noon hour we went through these various exhibits that were attached to the depositions, and there are certain ones of them to which we desire to direct objections.

The Court: All right.

Mr. Moody: One is to the minutes of November 30, 1946, to the minutes of December 3, 1946——

The Court: Suppose you refer to them by number too.

Mr. Moody: I will. Exhibit 6 is the minutes of November 30, 1946, and Exhibit 13 is the minutes of Decem-

ber 3rd, 1946. Exhibit 15, the order modifying the order of December 14, 1946. Number 19, an order of December 30, 1946. The letter, Exhibit 21, of January 13, 1947, and number 23, the supplemental opinion in 174-A,—as to each of these exhibits at one or more places in them, words to this effect are used, "issuing the certificate of convenience and necessity," or, "issuing a certificate of public convenience and necessity." We object to those parts of those several exhibits because they are legal conclusions as to the legal character or effect of actions taken by the Federal Power Commission and cannot be looked to for a determination of the question as to whether or not the order of November 30, 1946, was a certificate of convenience and necessity, followed, and within the terms of the contracts that the plaintiff alleges exist between it and the three defendants. We object to Exhibit No. 7, which is Mr. Fuquay's telegram. I overlooked that particular one. And for the same reason as just stated.

We object to Exhibit No. 14, Mr. Shannon's letter, which [fol. 268] accompanied the Austin Field Pipe Line application, and the documents attached; and we also object to the application and the documents attached, because they are immaterial, irrelevant, to any issue in this case and are hearsay as to each of the defendants. We make the same objection with respect to Exhibit No. 16, which is another letter from Mr. Shannon to the Power Commission, touching the application of the Michigan Consolidated Gas Company.

I believe that's all.

The Court: Objections are overruled; the exhibits may be admitted.

Mr. Moody: Now, Your Honor, there may be in some of these documents that we examined—some of them are quite lengthy; there may be in others than those I have mentioned statements to the effect that the Commission issued a certificate of convenience and necessity on November 30. We would like the objection to go to all such expressions as that because they are the expression of a legal conclusion and are not facts that would be admissible in evidence in this lawsuit.

The Court: All right.

Mr. Moody: Your Honor, among other contentions that the defendants make in this case is the contention that the action of the Commission which the plaintiff treats as a

certificate of convenience and necessity,—we contend that that was not issued prior to the receipt by the plaintiff of the telegrams from the defendants and the testimony—the first part that I offer is in support of that contention.

Defendants' Exhibit No. 1 is a copy of what is called the file copy of the order of November 30, 1946. We introduce that for the limited purpose of showing the date at the top of the page 1, for the purpose of showing the change appearing on page 6, and for those purposes only. You are familiar with that are you not?

The Court: Defendants' Exhibit No. 1 is admitted.

Mr. Moody: We next offer—the telegram of Stanolind [fol. 269] Oil & Gas Company notifying termination of the contract I believe is your exhibit 33? (Plaintiff's Exhibit 35.)

Mr. Turner: 33, 34 or 35, I don't know which. You are re-offering that?

Mr. Moody: No, it is already in evidence as I understand. Defendants' Exhibit 2 is a telegram addressed to the Stanolind Oil & Gas Company, Bartlesville, Oklahoma, replying to requests for report on the delivery to Phillips Petroleum Company of the telegram sent by Stanolind Oil & Gas Company to the Phillips Petroleum Company on December 2, 1946, and this telegram is "Phillips Petroleum Company, delivered F. E. Rice 9:38 A. M., Signed Western Union Telegraph Company."

The Court: It is admitted. I thought we agreed what the testimony of representatives of the Western Union would be as to time of delivery of these telegrams at the pre-trial hearing of this case.

Mr. Moody: Yes, sir, it was agreed that they would testify as shown in these telegrams, is my recollection of it.

The Court: I see.

Mr. Moody: Defendants' Exhibit No. 3 is a telegram, Bartlesville, Oklahoma, addressed to Skelly Oil Company at Tulsa, "Second Phillips Petroleum Company, Sgd.," I believe it is, "Skelly Oil Company, delivered 5:09 P. M. care F. E. Rice. Western Union Telegraph Company."

Now, will it be agreed that those two telegrams respectively, Defendants' Exhibit 2, gave the date of delivery of the Stanolind telegram to Phillips, and Defendants' Exhibit 3 gives the date of the Skelly telegram to Phillips—date and hour?

Mr. Turner: No, sir. At the pre-trial we agreed on the time of delivery of the Stanolind telegram, but as to the Skelly telegram, I call Your Honor's attention to the fact that the telegram which was received showed that it was received in Bartlesville telegraph office at 5:08.

Mr. German: We say 8:05.

[fol. 270] Mr. Turner: As we think the telegram shows. They have produced a telegram that shows it was delivered at 5:09; one minute later. We think that is too fast. We question that they could deliver a telegram that fast. We did, however, admit that if an Agent or employee of the Western Union were present he would testify he delivered it at 5:09. Under those circumstances we don't believe it is right for us to admit that it was a fact it was delivered at 5:09.

Mr. German: We don't agree as he states, the original telegram which was sent to Phillips shows that it was received at Bartlesville at 5:08; it is hard to tell. It was 5:0-something. The number is not at all clear. It could have been even 5:00 o'clock.

Mr. Moody: We offer in evidence then pages 40-41 of the record on pre-trial, the stipulation that the Magnolia telegram was received by Phillips Petroleum by 1:00 o'clock P. M., December 2nd, 1946.

The Court: All of the stipulations and agreements entered into at the pre-trial are considered in evidence as part of the record.

Mr. Moody: All right.

The Court: And I am still under the impression that the entire subject matter was at least thought by all of us to be adequately covered by agreements entered into at the pre-trial.

Mr. Moody: I offer in evidence rule—offer in evidence rule 13-B of the general rules of practice and procedure before the Federal Power Commission effective September 11, 1946, rule B issuance of orders "In computing any period of time involving the date of the issuance of an order by the Commission, the day of issuance of an order shall be the day the office of the Secretary *of* mails or delivers copies of the order, full text to the parties or their attorneys of record or makes such copies public, whichever be the earlier. The day of issuance of an order may or may not be the day of its adoption by the Commission. In any event the

office of the Secretary shall clearly indicate on each order the date of its issuance".

[fol. 271] Mr. Turner: Now, if the Court please, in connection with that rule, we disagree that those rules were effective September 11, 1946 to pending proceedings. The order adopting the rule is specifically to the contrary, applies only to proceedings filed thereafter. We think that rule is wholly immaterial in this case.

Now, I understood at the pre-trial conference that all pertinent rules could be considered by the Court, that is, I understood that judicial knowledge may be taken by the Court of all pertinent rules of the Federal Power Commission and as well as the orders adopting those rules. We all have the regular form of rules that have been put out at two different times by the Federal Power Commission and I wonder if we could have the understanding or agreement here now that the Court may take judicial knowledge of all pertinent rules of the Federal Power Commission.

Mr. German: General rules and regulations?

The Court: Together with any orders entered by the Commission which would reflect the effective date of the rules?

Mr. Turner: Yes, sir.

The Court: Is that agreeable?

Mr. Turner: Now, in that connection may I ask if it will not be agreed that the Court may take judicial notice of orders, reports of the Federal Power Commission that are published in the official bound volume reports of the Federal Power Commission? Do you have any objection to that?

Mr. Moody: How's that?

Mr. Turner: Will you so agree?

Mr. Moody: May I ask the Reporter to read it?

(Thereupon the Reporter read the last previous statement by Mr. Turner.)

Mr. German: What is the point, Mr. Turner, may I ask?

[fol. 272] Mr. Turner: In our brief, for one thing, Your Honor, we may want to call the Court's attention to the established practice of the Federal Power Commission in imposing conditions on the issuance of certificates, and we can do that by citing the case, by the official report citation. I must say that I think the Court could probably take judi-

cial notice of those reports and orders anyhow, but I have some question about it, and therefore, I would like to have that understood at this time if counsel are agreeable.

Mr. German: The difficulty is the broadness of his request, that we agree that everything that is in those reports, you may take judicial notice of. We don't know what all may be in them that he has got in his mind. If he will limit it to that, we would like to confer about it.

The Court: Well, I am sure he will have to eventually point out those things. I think it is kind of like agreeing that we take judicial notice of all reported cases in the Federal reports.

Mr. German: I suppose so.

The Court: Obviously only a few will be pertinent to any issue in this case.

Mr. German: Yes, that is true.

The Court. The Court's attention will have to be directed to those.

Mr. Moody: There are five volumes of them.

Mr. German: Would you give me a moment to confer?

The Court: Yes, sir.

Mr. Moody: Your Honor, we think those reports can be cited in a brief, just as the Interstate Commerce Commission reports can be cited, but we feel reticent to agree that as evidence by volumes of bound reports of the Federal Power Commission should go in evidence as part of the record in this case, because there would be a small part only I take it relatively few of the many things that are reported that would be pertinent to any question in this case.

[fol. 273] The Court: Suppose we get at it this way: Will you agree then that any cases reported in the Federal reports of the Federal Power Commission may be cited by either side in their briefs and may be considered by the Court in connection with any arguments in the case, without those reports being considered as actually in evidence?

Mr. Moody: Your Honor, one of the reports that I desire to offer in evidence, that is, parts of the orders taken from one of the volumes of the reports that I desire to offer in evidence, I have no objection to agreeing that they can cite the Court to in their brief, to the Federal—reports of the Federal Power Commission, just the same as they would the Interstate Commerce Commission.

The Court: All right.

Mr. Moody: Your Honor——

The Court: Now, in view of the stipulation entered into with respect to the rules of the Commission, do you desire to withdraw your offer of this rule 13-B?

Mr. Moody: No, sir, I will let it stay in. Here is something in connection with the Court's right to examine the rules: I would like that, to include the part of the rule here in the book, letter dated September 20, signed by the Secretary——

Mr. German: September 20, what year?

Mr. Moody: 1946.

Mr. Turner: Well, that is not a part of the rules; that does not purport to be an action of the Commission. It is a mere expression of desire on the part of the acting secretary concerning the request to parties as to the number and form of service of copies.

Mr. Moody: Well, the date of—the effective date, likewise.

Mr. Turner: That is not a part of our evidence—not a part of the bound rules that are put out—the copies we have.

[fol. 274] Mr. Moody: Yours don't show the effective date anywhere except on the outside cover?

Mr. Turner: Yes, it does—that is the order which we referred to that pertains to the specific rule which he has offered in evidence.

If the Court please, the order of August 23rd, 1946, adopting the rule which he has referred to, as well as other rules and specifically provided that these rules are to be applicable to proceedings before the Commission, initiated on or after September 11, 1946, and so forth.

Mr. Moody: Mark this will you please sir.

Mr. Turner: We will do this, Mr. Moody——

Mr. Moody: That is our Exhibit 5.

Mr. Turner: As far as notice——

Mr. Moody: The defendants offer in evidence defendants Exhibit 5, the notice contained in the—on the 2nd leaf of the general rules, including rules of practice and procedure of the Federal Power Commission dated September 20, 1946. Do you object to it?

Mr. Turner: We object to the manner in which this exhibit is offered for the reason that it is not a part of the rules.

The Court: Let me see it, please.

Mr. Moody: It is, Your Honor, a part of the—there is no question I take it that that is published and put out by the Federal Power Commission and it is a part of the publication of the department of the Federal Government, is it not—you admit that do you not, as stated by the Federal Government.

Mr. Turner: We will admit that the acting secretary at that time sent out that notice; we will admit that. But we do not admit it is part of the rules.

The Court: Defendants' Exhibit 5 will be admitted in evidence.

Mr. Moody: All right.

[fol. 275] Mr. German: I understood Mr. Turner to say these new rules specifically provided that they should not apply to proceedings initiated prior to September 11. I read it the other way; I mean, it is not stated that way; it is not stated negatively at all. It is stated only something to the effect that they shall apply to proceedings initiated on and after September 11.

The Court: I don't care to have you discuss it any further. That is one among a number of questions that I am going to have to decide later, which I expect will be covered in your briefs and in your oral arguments.

Mr. Moody: We offer in evidence from the rules of the Federal Power Commission, their superseded rules, effective June 1, 1938, rule—section 1.183, "Time of filing: a petition for rehearing must be filed within thirty days after the service of the order therein."

The Court: Any objection?

Mr. Turner: No, sir, there is no objection.

The Court: All right, admitted.

Mr. Moody: Your Honor, the next several documents are offered in connection with Plaintiff's Exhibit 15. Plaintiff's Exhibit 15 was an order dated December 14, 1946, issued December 16, 1946, modifying the order of November 30, in connection with that exhibit, Plaintiff's Exhibit 15 and for the consideration of the Court, and to show the practice of the Commission with respect to the application of this rule, and in this case, why, we offer these next few documents. I will indicate when I have offered all that bear on that—there is just one in fact.

(The instrument referred to by counsel was marked for identification as Defendants' Exhibit 7, and submitted to opposing counsel.)

Mr. Turner: Well, I take it that in the course of the introduction of the various exhibits on the part of the defendants that the fact that we do not object at the time to the exhibits on the ground that they are immaterial to a decision or determination of the merits of the case, will [fol. 276] not be taken to mean that we take the position that they are material. I take it that that is a matter that we can cover by briefs, the matter of materiality.

The Court: Oh, yes. I merely assume that if you don't object you just don't think it is worth while to object.

We will decide later whether the evidence is material or not.

Mr. Moody: This instrument, Your Honor, is "notice of order modifying"—what was—the notice of the order, which was Plaintiff's Exhibit 15, "modifying prior order." It is brief. It gives the style of the proceeding before the Power Commission and the number, dated December 17, 1946.

"Notice of order modifying order issuing certificates of public convenience and necessity."

Now, that part of it we do not offer for any purpose except to show how the Commission administered its rule in this particular case.

"Notice is hereby given that on December 16, 1946, the Federal Power Commission issued its order modifying order issuing certificate of public convenience and necessity" —again the same statement about that language; I have objected to it in the plaintiff's exhibits. "Entered December 14, 1946, in the above-designated matter."

And the order to which they refer, Plaintiff's Exhibit 5, bears date of December 14, 1946, and states its issuance date, December 18, 1946; and this notice that the Commission—the secretary issues a certificate is a true copy, shows how that proceedings is handled before the Commission, and its order administered.

The Court: Defendants' Exhibit 7 will be admitted.

Mr. Moody: The next instruments which I shall offer are of the same nature, and they relate to the—one of them, to Plaintiff's Exhibit 19. Plaintiff's Exhibit 19 was an order of the Commission entered on December 30, supplementing the order of November 30, 1946. It showed that it was [fol. 277] entered on December 30, and issued on December 31. This is Defendants' Exhibit 8.

The Court: Any objection, Mr. Turner?

Mr. Turner: No, sir.

The Court: All right, Defendants' Exhibit 8 admitted.

Mr. Turner: Except generally to the materiality of it.

Mr. Moody: Defendants' Exhibit 8 is a certified copy of a letter bearing date of December 31, 1946. This letter is addressed to Frank L. Conrad, President, Michigan-Wisconsin Pipe Line Company. Signed by the Secretary of the Commission. And there is a list of persons to whom it is sent, and it states that this order of the Commission dated December 30, 1946, being Plaintiff's Exhibit 19, is enclosed with this letter, and the date on the order, the date of the issuance is the date of the letter, sending it out.

All these are offered merely showing how this rule has been administered by the Commission, the rule 13-B.

This, Your Honor, Defendants' Exhibit 9 is a notice similar to the one I mentioned a while ago, to the effect that on December 31, the Commission issued an order that was entered on December 30.

The Court: Decendants' Exhibit 9 is admitted.

Mr. Moody: Your Honor, the plaintiffs—this Defendants' Exhibit 10 which I will now offer, relates to Plaintiff's Exhibit 20. Plaintiff's Exhibit 20 was an order dated January 3, 1947, showing the date of issuance on it as January 6, 1947, and Defendants' Exhibit 10 is a photostatic copy of a letter from the Secretary to Mr. Frank L. Conrad, and with a long list of persons to whom it was circulated, enclosing an order entered on January 3, 1947. This letter is dated January 6, 1947, the same date as the order shows, and it is the date of issuance.

The Court: All right, Defendants' Exhibit 10 will be admitted.

Mr. Moody: Defendants' Exhibit 11, offered for the [fol. 278] same purpose as the orders, is a copy of a notice to the effect that on May 8, 1947, the Commission issued an order entered May 6, 1947, and that notice relates to Plaintiff's Exhibit 26, which was an order dated May 6, and showed the issuance date as May 8th.

The Court: All right, Defendants' Exhibit 11 will be admitted.

Mr. Moody: Defendants' Exhibit 12 is a letter dated May 7, addressed to Mr. B. R. Kennedy.

Mr. German: What year?

Mr. Moody: May 7, 1947, addressed to Mr. B. R. Kennedy, signed by Mr. Fuquay and enclosing copies of the

original and three certified copies of the notice in the above designated matter.

That referred to Plaintiff's Exhibit 26.

The Court: You now offer Defendants' Exhibit 12?

Mr. Moody: Yes, I offer 12.

The Court: It will be admitted.

Mr. Moody: Defendant offers now Defendants' Exhibit 13, which is a letter addressed to Mr. Conrad by the Secretary, dated May 8, 1947, enclosing the order entered on May 6, and carries a list of persons to whom it was addressed.

The Court: Defendants' Exhibit 13 is admitted.

Mr. Moody: Now, Your Honor, all of those documents that I have offered there from——

Mr. German suggests that I state that the letter refers to the order of May 7, in the Michigan-Wisconsin Pipe Line Company, number G-669.

Mr. Black: May 6.

Mr. Moody: Now, Defendants' Exhibit 7 to 13 inclusive were offered for the limited purposes showing that in the very case in which this order of November 30, 1946 involved in this case was issued, in that very proceeding, the Commis-[fol. 279]-sion applied this rule 13-B in the manner indicated by those exhibits.

Defendants' Exhibit 14 is an order dated November 30, 1946, headed Findings and Order Denying Motion of intervener, Panhandle-Eastern Pipe Line Company to dismiss application of Michigan-Wisconsin Pipe Line Company *to dismiss application of Michigan-Wisconsin Pipe Line Company* showing that it was issued—entered on November 30, 1946, issued on December 2nd, 1946, and this in the very proceeding number, G-669, which was in the matter of the Michigan-Wisconsin Pipe Line Company's application for certificate of convenience and necessity.

The Court: What number is that?

Mr. Moody: That is Defendants' Exhibit 14.

The Court: Defendants' Exhibit 14 admitted.

Mr. Moody: Defendants' Exhibit 15 is a copy of an order dated January 14, 1947, denying the application for reconsideration and vacation, or, in the alternative, for a rehearing of order issuing certificate of public convenience and necessity. It is dated January 14—shows date of issuance, January 15, 1947, and in the same proceeding, G-669.

The Court: 15 is admitted.

Mr. Moody: Defendants' Exhibit 16 is an order dated January 14, 1947, in the same docket number, G-669 denying application of the Panhandle and Eastern for rehearing and denial of motion to dismiss, showing date of issuance January 15, 1947—offered in evidence.

The Court: It is admitted.

Mr. Moody: The next is a notice, Defendants' Exhibit 17, also a notice, dated January 15, 1947, and stating, that on January 15, 1947, the Commission issued an order, entered on January 14, 1947, and this is in docket No. G-669. And we offer that.

The Court: It is admitted.

Mr. Moody: The next, Defendants' Exhibit 19, is a let-
[fol. 280] ter addressed to Mr. B. R. Kennedy, signed by the Secretary, dated January 16, stating that there is enclosed an original and three copies of a notice in the above designated matter. And requests their publication in the Federal Register. This letter is dated January 16, 1947, and captioned, "Michigan-Wisconsin action number G-669." Defendants' Exhibit No. 18—and I offer Defendants" Exhibit 19 in evidence.

The Court: Defendants' Exhibit 19 is admitted.

Mr. Moody: Defendants' Exhibit 18 is an instrument, is a letter dated January 15, 1947, addressed to Mr. Conrad, President of the Michigan-Wisconsin Pipe Line Company, and enclosing orders entered by the Commission on January 14, in the above entitled and numbered cause. These Exhibits numbers 14 to 19 inclusive, are offered—and offered for the limited purpose of showing that this order or—this order, stated in rule 13-B was applied in this case and in the proceedings in this very case.

The Court: Defendants' Exhibit 18 will be admitted.

Mr. Moody: All right. I offer in evidence Defendants' Exhibit No. 20 which is a paragraph of page 14219 of the Federal Register, of Tuesday, December 10, 1946. It is notice—headed, Panhandle-Eastern Pipe Line Company; notice of Findings and Order issuing certificate of public convenience and necessity. December 3, 1946. Notice is hereby given that on December 2, 1946, the Federal Power Commission issued its findings and order issuing certificate of public convenience and necessity, entered November 30, 1946, in the above designated matter. Signed by Mr. Fuquay.

Now, gentlemen, I would like to ask if you will admit that each of the orders that have been entered in this case No. G-669, the Michigan-Wisconsin application, were published in the Federal Register with the exception of the order of November 30, 1946, issued—notice of it I mean was published, of every one of them was published in the Federal Register with the exception of the order of November 30, 1946, which you assert is an order granting a certificate of convenience and necessity.

[fol. 281] Mr. Turner: We don't know that to be the case; I have not checked the Federal Register.

The Court: Defendants' Exhibit 20 will be admitted in evidence.

Mr. Moody: How's that, Your Honor?

The Court: Your Exhibit 20—I assume you are offering it.

Mr. Moody: Yes, sir, I offer Defendants' Exhibit 20.

The Court: It will be admitted in evidence.

Mr. Moody: That order in connection with this Defendants' Exhibit 20, Your Honor, I might call your attention to the fact that that particular order there referred to, Panhandle-Eastern Pipe Line Company, is one of the orders attached to the minutes of—Commission minutes of December 3, which were introduced by the plaintiff.

Mr. Jones: Minutes of November 30?

Mr. Moody: Minutes of November 30 and December 3—both minutes of November 30 and December 3.

Mr. Turner: In regard to sta'ements, if the Court please, like that, I take it that by our failure to make a statement at the time that we are not agreeing—we are not considered as having agreed with the analyses or statements of Mr. Moody as to what those records that he refers to actually show. They are in evidence here. And I think that that statement is incorrect.

The Court: That is a correct assumption.

Mr. Moody: Mr. Turner, will you stipulate that since you are not—have not made an examination of the Federal Register, will you stipulate that the Federal Register may be—I think it is a matter of judicial knowledge anyhow, for the Court to take judicial knowledge of the Federal Register; will you stipulate that the parties in their briefs may make reference to the pages of the Register, on the dates that these various actions were taken in this case before the Power Commission?

Mr. Turner: Yes, sir.

[fol. 282] Mr. German: And as negative proof, and as proof that the November 30 order was never published in the Register?

Mr. Moody: Well, we will try to establish that.

Your Honor, defendants' exhibit numbers 21, 22, and 23 are offered in connection with Plaintiff's Exhibits No. 22 — that exhibit, Your Honor, was the copies of the opinion showing the dates of—I believe it is—I don't catch the date right readily; dated January 17th, I believe they are, and issued February 7th. Defendants' Exhibit 21 is a certified copy of a letter addressed to Mr. Conrad by Mr. Fuquay, dated February 7, 1947. It is in the Michigan-Wisconsin proceeding, No. G-669, enclosing copy of the opinion number 147, entered by the Commision on January 17, and that is offered for the purpose of showing the application of that rule to this case.

The Court. It is admitted.

Mr. Moody: Defendants' Exhibit 22 is a notice issued by Mr. Fuquay, of opinion number 147, giving notice that on February 7 the Commission issued its opinion, adopted on January 17, 1947.

The Court: Defendants' Exhibit 22 is admitted.

Mr. Moody: Defendants' Exhibit 23 is a letter dated February 10, to Mr. Kennedy, of the Federal Register, stating that they are enclosing an original and three copies of opinion number 147.

The Court: 23 is admitted also.

Mr. Moody: Defendants' Exhibits 24, 25, 26, 27 and 28 are offered in connection with Plaintiff's Exhibits Nos. 23 and 24. Those exhibits were copies of opinions of the Commission showing date of issuance, date of the opinion and then date of issuance. Defendants' Exhibit 24 is in the matter of Michigan-Wisconsin Pipe Line Company, docket No. G-669, dated March 12, 1947, and encloses the opinion 174-A, together with the order entered by the Commission on February 20, in the above entitled matter, and the dissenting opinions.

Mr. German: 147-A.

[fol. 283] Mr. Moody: 147-A, and states, the dissenting opinion of Commissioner Olds will be mailed later.

Defendants' Exhibit 25 is a letter dated March 13, 1947, to Mr. Kennedy, enclosing certified copies, original and three certified copies of the notice of the opinion, 147-A.

Defendants' Exhibit 26 is a copy of the notice stating that on March 12, the Commission entered—the Commission issued its opinion 147-A, and order entered February 20, 1947.

Defendants' Exhibit 27 is a letter dated March 21, enclosing a copy of the dissenting opinion of Commissioner Olds, which dissenting opinion bears the date, Plaintiff's Exhibit 24 bears date of March 21, 1947.

Mr. German: Who is that letter to?

Mr. Moody: The letter is to Mr. Conrad.

And Defendants' Exhibit 28 is a copy of an order modifying opinion 147 in case number G-669, matter of Michigan-Wisconsin Pipe Line Company. I believe you offered that order, did you not?

Mr. Turner: I don't believe so.

Mr. Moody: You don't? Well, it is an order dated March 6, 1947 and issued May 8, 1947. We offer that—we offer—defendants offer Defendants' Exhibit 24 to 28, inclusive, for the limited purpose of showing the administration by the Commission in this particular proceeding, Michigan-Wisconsin proceeding, of its rule 13-B, and then Defendants' Exhibit 28 is offered for the further limited purpose of showing the changes thereby made in the order of November 30, 1946.

The Court: All right, they will be admitted.

Mr. Moody: Now, Your Honor, the next offer is one that maybe these gentlemen will admit, if they have checked.

If it please the Court, I think this admission satisfies the matter. I desire to show by volume 5 of the Federal Power Commission reports, and they are for the year January [fol. 284] 1946 to December 1946, and I desire from that report to show that every order of the Commission published in these reports subsequent to September 11, 1946, and beginning on page 760 of the report and continuing through to page 1028, with the exception of the order of November 30, 1946 involved in this case, which appears on pages 953 to 956, showed a date of the order, and at the bottom of it as provided by rule 13-B the date of issuance of the order, and I think in each instance the date of issuance and the date of the order is different dates—and are later dates.

The Court: What does this book show with reference to the order of November 30?

Mr. Moody: Of November 30, it shows the order is dated November 30, 1946, and as far as I know it is an exact copy of the full copy introduced in evidence by the plaintiff, and it does not have any date of issuance at the bottom of the order at all. It does have that paragraph C, with which Your Honor is familiar, for the purpose of computing the time within which applicant for rehearing may—applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later."

Now, Mr. Turner, I understand, agrees that the Court may and the parties may refer to this volume to establish what I stated are the facts.

Mr. Turner: We will agree that the Court may take judicial knowledge of what is reported, and how it is reported in that volume 5.

Mr. Moody: Is this available in Your Honor's library?

The Court: No, it is not.

May I suggest that you go a little further and agree that the report to which reference is made discloses facts as stated by Mr. Moody, subject to your verification, and if it develops that any part of the statement is incorrect, then you may call my attention to it.

Mr. Turner: In the briefs, or in some other manner?

[fol. 285] Mr. Moody: Well, I would like for him to call my attention to it first, before he puts it in the brief—I will correct it; but I checked them and I think it is correct. However, I could be mistaken.

The Court: All right.

Mr. Moody: Your Honor, in connection with Plaintiff's Exhibit 9 and Plaintiff's Exhibit 50, I desire to offer Defendants' Exhibit 29. Your Honor, Plaintiff's Exhibit 9 was the letter of December 2nd, addressed to Mr. Conrad, which enclosed the orders of November 30, entered in this G-669, Panhandle-Eastern, and Michigan-Wisconsin matter and Plaintiff's Exhibit 50 was a certified photostatic copy of the records of the registered mail, on those letters. And Defendants' Exhibit 29 which is now offered are the certified copies from the Postal Department of the documents showing the receipt of the letter, receipt by the Postal Department of the letter mailing out these orders entered on November 30. They show letters mailed to Frank M. Conrad of the Michigan-Wisconsin Pipe Line, to John S. F.

Yost, Panhandle-Eastern Pipe Line Company and to A. J. Mayotte, of the Michigan Gas Storage Company, and these instruments show that these letters which—transmitted to these persons, the orders of November 30 were received by the postal authorities at 8:45 P.M. on December 2nd, 1946.

The Court: All right.

Mr. Moody: And that is the—there also appears on this certified copy an hour of 9:35 P.M., but I don't believe it is identified as to what that particular hour referred to.

Mr. German: Why, it is my memory that the pre-trial conference will show what both of those hours indicate, the 8:45, or whatever it is, was the time the post office messenger picked the package up at the Federal Power Commission's office, and the 9:35 the time when they were sent out by registered mail. I think that is it.

The Court: At any rate either hour is after the time that these telegrams were sent on December 2nd.

Mr. German: That's right, yes, sir.

[fol. 286] The Court: It wouldn't make any difference whether it was 8:30 or 9:30.

Mr. German: That's right, Your Honor.

The Court: Exhibit 29 will be admitted.

Mr. Moody: Your Honor, we have some witnesses now as to the time that these orders of November 30 were made available to the public and in connection with this testimony, whether they were issued before or after the telegrams of December 2nd, we desire to offer that testimony. Mr. Stull.

This witness has not been sworn.

Leo F. Stull, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Mr. Moody: As I see this morning, I believe, Your Honor, counsel are required to stand in examining a witness in this Court?

The Court: Yes, sir, that is an old rule we have had here for a long time. I don't think it makes any particular difference.

Direct examination.

By Mr. Moody:

Q. State your name.

A. My name is Leo F. Stull.

Q. Where do you live, Mr. Stull?

A. I live in Arlington, Virginia.

Q. What business are you engaged in?

A. I am a lawyer.

Q. Where are you practicing law?

A. In Washington, D. C.

Q. On or about November 30, 1946, were you not acquainted with the fact that there was pending before the Federal Power Commission an application by Michigan-Wisconsin Pipe Line Company for a certificate of public convenience and necessity authorizing the construction and operation of a pipe line?

A. I was.

Q. And on that day did you have occasion to go to the [fol. 287] offices of the Federal Power Commission?

A. I did. I was called about ten o'clock in the morning and asked to——

Mr. Turner: Well, we object to that if the Court please, as to what somebody told him over the telephone.

The Court: Sustained. Just answer the questions, Mr. Stull.

By Mr. Moody:

Q. All right, did you have any occasion to go to the office of the Federal Power Commission?

A. I did.

Q. Was that occassion the result of an employment you had?

A. It was, yes, sir.

Q. By whom were you employed?

A. Stanolind Oil & Gas Company.

Q. Do you recall at what hour of the day, or at what hours of the day you were at the offices of the Federal Power Commission?

A. I was there almost continuously from approximately noon until *approximaterly* 7:30 in the evening of November 30, 1946.

Q. Now, then, do you know whether or not the Commission was—the Federal Power Commission was in session or holding a meeting or session on that day?

A. Yes, it was.

Q. Do you know approximately what hour of the evening the Commission completed its work or completed whatever it was doing and closed up and went home?

A. I can give it approximately.

Q. All right.

A. I was at the Commission and as I say, off and on all day; at about 6 o'clock in the evening I left, and went across the street to the hotel and had my dinner and returned just after 7 o'clock in the evening. At that time I met one of the Commissioners coming out of the door, and it is the front entrance of the building, and I thought that the Commission had adjourned, so I went upstairs to the office of one of the Commissioners, whom I had known for a number of years, Commissioner Draper. He was in his office and told me they had adjourned.

Mr. Turner: We object to the hearsay as to what somebody told this witness.

[fol. 288] The Court: That objection is sustained.

By Mr. Moody:

Q. Well, when you got to Commissioner Draper's office——

The Court: You know better than that, Mr. Stull. Just eliminate the hearsay.

The Witness: All right.

By Mr. Moody:

Q. When you got to Commissioner Draper's office, he was in his office, I believe you said?

A. That's right.

Q. Did you see anyone else around the Commission there other than Mr. Draper and the other member of the Commission you say you saw leaving the building as you came into the building, about this hour?

A. Mr. Draper's secretary was there, and in the outer office of the Secretary of the Commission, there were two girls, one of whom I didn't know.

Q. Do you know whether or not it is a regular practice of the Federal Power Commission to be open for business and transacting business on Saturday afternoon?

Mr. Turner: Well, we object to that, if the Court please, on the ground that it is not—this witness has not shown himself qualified to answer that question.

The Court: Well, he asked him if he knows. Objection overruled.

A. Yes, I know from my experience, and having to do business before the different Government Agencies in Washington, that——

By Mr. Moody:

Q. Is it or not the practice of the Federal Power Commission to be open for business and transacting business on Saturday afternoon?

Mr. Turner: We object to that on the ground that it is immaterial.

The Court: I think it is immaterial, but it was also covered by Mr. Fuquay in an incidental way in his testimony by deposition. I will let him answer.

You may answer.

A. It is not the custom.

[fol. 289] By Mr. Moody:

Q. Now, on this particular Saturday afternoon did you —as you were around there, I understand you to say you dealt with that Commission—have you dealt with it frequently?

A. No, I wouldn't say frequently.

Q. Well, have you been acquainted with it and its personnel around there over some period of time?

A. Well, only slightly. I only have known a few of them.

Q. Well, let me ask you this question: Do you know whether or not there was a full staff working there on this Saturday afternoon, November 30, 1946?

A. Yes; there was not a full staff.

Q. All right, now, did you at that time undertake to secure a copy of any order that the Commission might have entered in this case No. G-669, Michigan-Wisconsin Pipe Line Company's application for a certificate of public convenience and necessity?

A. I did.

Q. Were you able to secure it?

A. I was not.

Q. Now, then, Mr. Stull, were you back at the Commission offices on Monday, December 2, 1946?

A. I was.

Mr. Turner: I beg your pardon, I did not get the question.

(Thereupon the Reporter read the question.)

A. I was.

Mr. Moody: Were you there on Sunday, December 1, 1946?

A. Yes, sir, I was.

Q. At what hour of the day were you there on December 1, 1946?

A. I only went there once, at about 10:30 in the morning.

Q. Was the—were the offices at the time open and for the transaction of business?

A. No, I was refused admission to the building by the guard.

Q. All right, now, were you back on December 2, 1946—that was Monday I believe.

A. That's right.

Q. All right. Well, were you there?

A. I was, yes, sir.

Q. All right, now then, what time did you get to the Commission office on December 2, 1946, the Federal Power [Vol. 290] Commission office?

A. The first time at about 10:30 in the morning.

Q. At that time did you make any effort to secure a copy of any order that the Commission had entered or had made in this case No. G-669, Michigan-Wisconsin Pipe Line Company's application?

A. Yes, sir, I did.

Q. Where and of whom did you make your request for a copy of any order or other evidence of——

A. I requested at first at the Secretary's office, at the Secretary of the Commission, Fuquay's office. I also tried to get one from my old friend Commissioner Draper.

Q. All right, were you able to get—that was at 10:30 in the morning?

A. Yes, sir.

Q. Don't answer this question until they object: Did Mr. Fuquay make any response to your request?

Mr. Turner: We object to that on the ground that it is hearsay; he is calling for hearsay as to what he proposes to establish by this witness.

The Court: It's all right to ask if he made a response, but not to ask what the response was.

Mr. Moody: Your Honor, I am going at it in just that way: Thank you, sir.

The Court: You may answer that question: Did he make any response to your request, without telling what the response was.

A. I didn't ask Mr. Fuquay himself.

By Mr. Moody:

Q. Oh, you didn't see Mr. Fuquay?

A. I asked his secretary.

Q. His secretary?

A. That's right.

Q. All right, did you talk to Mr. Fuquay during the day at any time?

A. On December 2nd, 1946?

Q. Yes.

A. Yes, I did, on one occasion only.

Q. At what time of the day was that?

A. That was right after lunch, I would say around 1 or 1:30.

Q. All right, did you make any request of him at that time for a copy or other writing evidencing any action taken by the Commission in this case, G-669?

Mr. Turner: Now, we object to that unless he calls for either a yes or no answer.

[fol. 291] The Court: Overruled; you may answer the question.

A. My inquiry to him was, when would I be able to get a copy of the order in the case.

By Mr. Moody:

Q. All right, prior to that time had you asked Draper there, or others around there for a copy of an order?

A. I had, yes, sir.

Q. All right, had you been able to procure one?

A. No, sir.

Q. All right, when you asked Mr. Fuquay when you could get a copy, state whether or not he gave you any estimate as to the time when he expected you could get a copy.

A. I didn't ask Mr. Fuquay himself; I didn't question him as to exactly the time that I would be able to get a copy. I think I asked him—possibly I said, when can I get one, or how soon can I get one, or are they available yet—I don't remember exactly what I asked him, but I was not able to get one at that time.

Q. All right, now then, how late did you remain there at the Federal Power Commission's office that afternoon on December 2nd, 1946?

A. Until about 7 o'clock.

Q. Were there any other people around there at that time that you know of that were making requests for copies of the order, of this G-669?

A. Yes, different times in the afternoon when I was in the Secretary's office, there were various persons who came in and asked for copies of the order.

Q. All right, did you see any of them supplied with copies of the order prior to 6 o'clock?

A. No, I did not.

Q. All right, now, were you there when they—were you in the Secretary's office between 5 and 6, and 6 and 7, or in and out of the Secretary's office between 5 and 6 or 6 and 7, on December 2nd, 1946?

A. I was there continuously from about a little while after 5 o'clock until about 7 o'clock.

Q. All right, were any copies of an order of November 30, 1946, in this proceeding number G-669 given out to anybody in the Secretary's office there that you saw prior to 6 o'clock P.M. on December 2nd?

A. No, sir, no, sir.

Q. Did you see the first copies that were given out there in that office?

A. I did.

[fol. 292] Q. Do you know at what time the first copies of this order of November 30, 1946 in G-669, Michigan-Wisconsin Pipe Line Company's application, were given out at the Power Commission office?

A. I do.

Q. At what time were they given out?

A. 6:15 P.M.

Q. 6:15 P.M. Where were they given out?

A. In the office of Secretary Fuquay.

Q. Do you know approximately how many people were there waiting for them at that time?

A. Well, the office was crowded; I would say that there must have been, oh, 15 or 20 people at least.

Q. Do you know how long others had been waiting around there?

A. Well, as I say I was there from just a little after 5 o'clock until about 7 o'clock and they kept coming in gradually until the time they started distributing the orders there was this group of people in there—must have been 15 or 20 of them.

Q. You fix that at 6:15?

A. Yes, sir.

Q. Now, Mr. Stull, did you go—make any efforts during the day to get—strike that. Were the copies, when they were finally delivered to you, were they mimeographed copies?

A. Yes, sir.

Q. Were you acquainted with the location of the mimeograph room, or where the mimeographing was done at the Federal Power Commission's offices at Washington?

A. Yes, sir.

Q. During the day did you make any trips to the mimeograph room in an effort to secure copies of the order of November 30?

A. Yes, I did on two or three occasions.

Q. All right, were you able to secure any copies at the mimeograph room?

A. No, sir, I was not.

Q. Now, then, at the time that they passed out there in the Secretary's office or handed out in the Secretary's office the copies of this order, of November 30, 1946, in No. G-669, did they hand out any copies of any other orders other than this one that related to the Michigan-Wisconsin Pipe Line Company's business, which has been introduced in evidence here as Plaintiff's Exhibit 6?

A. So far as I know that is the only one that was given out; that was the only one that I was there to obtain at least.

[fol. 293] Q. You did not get any other order there at that time?

A. No, sir.

Q. I hand you here what is a part of Plaintiff's Exhibit 6, attached to the deposition of Mr. Fuquay and I will ask you to examine that and state whether or not that purports to be a copy or is a copy of the order that you—

of which you received a mimeographed copy at the hour stated on December 2nd, 1946 at the office of the Secretary of the Federal Power Commission?

A. Yes, sir, it is.

Q. It is. Now, that instrument is headed is it not—it is dated November 30, 1946, and docket G-669, and it has a page number, the first page of it, page 22,464 and the last page is 22,469; that is the order you identify is it not?

A. That is correct.

Mr. Moody: Now, then, Your Honor, with your indulgence I am going to ask him what he was told in response to his various requests for copies of these orders.

The Court: That would not be proper.

Mr. Moody: During the day, for the purpose of making an appeal, showing what his testimony would have been. I understand Your Honor holds the testimony is not admissible.

The Court: Yes, sir. You don't think it is admissible, do you?

Mr. Moody: Sir.

The Court: You don't think it is admissible do you.

Mr. Moody: I am inclined to doubt it, Your Honor. Some of my associates have suggested that we make the bill, that they think perhaps it is admissible.

The Court: Which associate thinks so? I would just like to know.

Mr. German: I am one. I have not talked with Mr. Moody's other associate. I think that what the people in the office of the Secretary of the Commission said in explanation of why that order was not available—copies of it, is part of the res gestae here, and is admissible in evi- [fol. 294] dence on the question as to how it happened that that order was so late coming out.

The Court: Why will there be any evidence to offer to contradict the testimony of this witness that no orders were given out by the Secretary until 6:15 P. M. on December 2nd?

Mr. Turner: We have no evidence—we have no evidence as to the exact hour that the order was put out, due to the fact that the people we talked to just could not recall the time with any degree of accuracy.

The Court: Well, in view of that statement I think you gentlemen may assume that I am going to believe his testi-

mony that he tried to get an order and could not get one until 6:15.

The Witness: As a matter of fact——

Mr. German: Then there is one other point. We contend that that order was not completed—I mean that the master draft that Fuquay speaks of, was not complete, and at least insofar as it was finally copied into what became the mimeographed order, and the vault copy and the file copy of the order, until on Saturday—until on Monday, December 2nd. And their statements that were made by Fuquay and by people in his office bear on that question. And I say that as a matter of law the declarations of those people who were then and there working on this very thing are competent evidence. They are not hearsay. It is a declaration of facts made at the time, under the circumstances existing there, with all these people wanting copies, why, why, why,—it is a part of *the res gestae* and admissible in evidence as bearing upon not only the question of the hour and minute when they handed out copies but also on the question of why the delay and when was that order finished.

The Court: Well, I don't think the evidence is admissible. If you want to make the record on it——

Mr. Moody: Your Honor, I believe I am going to have to amend my views on it and amend my statement, since I am about to change my views. I believe Mr. Fuquay [fol. 295] gave some testimony about the status of this order during the day of December 2nd, 1946 and that has all—the entire deposition has gone in evidence I believe. My recollection is, on his deposition that he gave some testimony, and certainly if that testimony is in, why, it would be—that threw light upon it, or as to the delays, or maybe might differ in some respects with Mr. Fuquay's testimony. I believe would be admissible.

The Court: Of course, any statements that this witness would testify as having heard Fuquay make that would tend to contradict his testimony could go in on the theory of impeaching evidence; but on no other theory.

Mr. Moody: As to what someone else may have said around the Commission there as to why the delay, you rule that is not admissible.

The Court: I don't think it is.

By Mr. Moody:

Q. Mr. Stull, did Mr. Fuquay make any statement to you on December 2nd, 1946, in explanation of the delay in these orders being made available to the public?

A. No, no explanation; merely an answer to the question that I asked him.

Q. What was his answer?

Mr. Turner: Now, wait a minute, I didn't get the statement.

A. I say, in answer to the question that I asked him right after lunch in his office, he merely said that the order was not——

The Court: Just a minute.

Mr. Turner: You are getting ready to say what he told you, is that correct?

A. That is correct, yes.

Mr. Turner: Well, we object to that, Your Honor, as hearsay and no foundation having been laid. As I understand——

The Court: No foundation laid for impeachment of the witness Fuquay?

Mr. Turner: Yes, sir.

[fol. 296] The Court: In the deposition.

Mr. Moody: May I ask the witness what the answer would be, and then maybe I will know whether to insist on it?

All right, Your Honor, we insist on the—I don't think it will hurt or help either one.

The Court: I am going to sustain the objection.

Mr. Moody: All right, note our exception. Dictate the answer—what was the answer? State the answer for the record.

The Witness: The answer was, "The copies are not ready yet."

The Court: It is a matter of great moment then.

Mr. Moody: That's all. Take the witness—for the record I would like to ask these questions:

By Mr. Moody:

Q. Did you make any inquiry of Mr. Fuquay as to why notice of the order of November 30, 1946, in the case No.

G-669, the Michigan-Wisconsin application, was not published in the Federal Register?

Mr. Turner: We object to that on the grounds it is wholly immaterial, also it is obvious it would be hearsay.

The Court: He may answer if he made inquiry.

A. Not of Mr. Fuquay.

By Mr. Moody:

Q. Mr. Fuquay made no statement to you on that subject?

A. I did not inquire as to that from Mr. Fuquay.

Q. Did he make any statement to you on that subject?

A. No, sir.

Q. He did not.

Mr. German: I would like to remark, it is no further away from here, say than his newspaper articles about what they did.

The Court: I think you misconceive the purpose for which those articles are admitted in evidence, Mr. German. If you think they were admitted for the purpose of prov- [fol. 297] ing any facts stated in the articles themselves, you do misconceive the purpose. They were received in evidence only for the purpose of showing that the information with respect to the entry of the order was released to the press on that day.

Mr. German: I see.

The Court: Not as proof of anything in the article.

Mr. German: I will frankly confess, Your Honor, I was jesting Mr. Turner,—I was not intending to reflect on the order; I was teasing Mr. Turner.

The Court: I thought you were *testing* me.

All right, any cross-examination?

Mr. Moody: May I ask the witness a question, Your Honor?

The Court: Yes, sir.

Mr. Turner: No questions.

The Court: That's all.

Mr. Moody: Just a minute, Your Honor. I would like to ask the witness one other question.

The Court: All right.

By Mr. Moody:

Q. Mr. Stull, did any person at the Federal Power Commission make any statement to you as to why notice of this order referred to in my last question was not published in the Federal Register?

A. Yes, sir.

Q. Who made the statement?

A. Mr. Gutride, who is assistant secretary of the Commission.

Q. What was the statement?

Mr. Turner: We object to that if the Court please on the ground it is hearsay.

The Court: Sustained.

Mr. Moody: I would like to ask another question; I think it may go to its admissibility:

By Mr. Moody:

Q. Do you know whose office is charged with the duty, in the Federal Power Commission, of sending out notices to the Federal Register.

[fol. 298] Mr. Turner: We object to that if the Court please.

The Court: You may answer, if you know; I mean, he may answer this particula. question as to whether he knows.

A. Yes, sir.

By Mr. Moody:

Q. Whose office is charged with that office?

A. The secretary——

Mr. Turner: Well, we object to that now as calling for a conclusion of the witness.

Mr. Moody: Your Honor, I suggest it don't look like much of a conclusion because we have got a half a dozen or more of those notices here signed by the secretary.

The Court: I will overrule the objection.

Mr. Turner: May I ask a preliminary question?

The Court: All right.

Mr. Turner: How do you know whose duty it was, Mr. Stull?

A. Because I asked at the secretary's office.

Mr. Turner: Somebody told you that it was somebody's duty, is that it—is that the basis for your knowledge?

A. The assistant secretary told me that it was his duty.

Mr. Turner: Now, don't tell me—he just told you who was supposed to do it, is that it?

A. That's correct, yes, sir.

Mr. Turner: And that is the basis for your—that is the basis for your knowledge of whose duty it was to publish the notice in the Federal Register, is that it?

A. That is correct.

Mr. Turner: We object to that if the Court please, on the ground that the answer is based on hearsay.

The Court: Objection sustained.

Mr. Moody: Your Honor we would like to have the answer for the record if we may.

The Court: All right.

Mr. Moody: What was Mr. — the assistant secretary's statement to you, please?

[fol. 299] Mr. Turner: I take it that our objection, since he is rewording the question, we object to it on the ground that it is hearsay.

The Court: Your objection is sustained; it won't be considered; he may answer for the record, however.

A. His statement to me was that there were two reasons why it was not published: One was that it was not a final order, and secondly, that the Federal Register Act does not require the publication of any Government notice or order or regulation in the Federal Register if the parties affected thereby are served with copies of the order, or whatever it may be.

Mr. Moody: That's all.

The Court: That's all. Is this next witness going to testify to the same thing?

Mr. Moody: I am going to ask him to testify what——

Don H. Culton, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Moody:

Q. Your name is Don H. Culton?

A. That's right.

Q. You live in Amarillo, Texas?

A. That's right.

Q. Engaged in the practice of law at Amarillo and have been for some 30 years?

A. In Amarillo more than 20.

Q. All right, did you represent one of the parties that was interested in the Michigan-Wisconsin Pipe Line Company application for a certificate of convenience and necessity numbered on the docket of the Commission as G-669?

A. I did; I represented Panhandle-Eastern Pipe Line Company.

Q. *That concern* had an application pending, did it not?

A. Yes, docket G-706, which was consolidated with G-669.

Q. There has been offered in evidence here by the plaintiff and identified as Plaintiff's Exhibit 8, an instrument that purports to bear your signature, D. H. Culton, the instru- [fol. 300] ment is dated December 2, 1946. Will you please state, did you sign that instrument?

A. I did.

Q. Were you present when the other man whose name appears there signed?

A. I did—I was.

Q. What is that other name, please sir?

A. His associate here can give me his name; I do not recall it; he is associated with one of counsel sitting at the counsel table. I can't read it, and I can't remember it.

Charles V. Shannon: Generally—G-e-n-e-r-a-l-l-y.

The Court: Is that your testimony now?

A. That is correct.

The Court: That his name is "Generally"?

A. Yes, sir. I had met him, I know the man, several times, but I did not know his name.

By Mr. Moody:

Q. Did you on that date, December 2, 1947, receive a copy —'46, receive—December 2nd, 1946. Mr. Reporter—receive a copy of an order entered by the Commission in that number, G-669?

A. I did.

Q. At the same time did you receive copies of any other orders?

A. I did.

Q. In what proceedings were they?

A. In docket G-706, which was Panhandle's application.

Q. All right, how many orders did you receive now?

A. Three; two in 669 and one in 706.

Q. All right, do you recall the hour of the day at which you received—the hour of the day or the time of day that you received those three orders?

A. I do. It was sometime after 6 o'clock. But for the fact that the preceding witness said 6:15 I would have said sometime between 6:15 and 6:30.

Mr. Turner: We object to that—just a minute.

A. It was at least that late.

The Court: Just a moment. You may finish your statement, and then you may move to strike that portion——

The Witness: My own estimate would have been between 6:15 and 6:30.

By Mr. Moody:

Q. That was December 2, 1946?

A. That's right.

Q. Mr. Culton, I hand you here a part of Plaintiff's [fol. 301] Exhibit 6; I direct your attention first to that part of the exhibit which is—where the pages are numbered in the upper right hand corner from 22,461 to 22,469. I will ask you to examine that and state whether or not that is a copy of one of the Commission orders that you received at the hour or time stated, on December 6, or December 2nd, 1947?

Mr. German: '46.

By Mr. Moody:

Q. '46.

A. That is a copy of the three orders received, with one difference: Page 22—shall I state the difference?

Q. All right, sir.

A. Page 22,469, paragraph 3; at the top, as I recall it in the documents which you have just shown me does not include the word "contractual" between the word "Panhandle's" and the word "rights." In the documents which were delivered to me that afternoon at the Commission, that paragraph read "Panhandle's contractual rights." And the word "contractual" had a mark run through it.

Q. I hand you here defendant's Exhibit 1 and direct your attention to the top of page 6 and ask you if that shows the word "contractual".

A. That shows the mark through the word "contractual" which I have just referred to.

Q. Now, Mr. Culton, did you examine all of these—only the matter appearing between pages 22,461 to 22,469—did you examine, in answer to the question that these are the three orders, did you also examine the pages between 22,470 and 22,475?

A. I did.

Q. All right, then, as I understand you, those pages 22,461 to 22,475 of this Plaintiff's Exhibit 6, are the copies of the three orders, with the exception of the word that you have described as being marked out?

A. That's right.

Q. Now, Mr. Culton, had you at any earlier hour in the day attempted to secure copies of these three orders?

A. I had.

Q. At what hours did you make requests for them or try to get them?

A. I——

The Court: I don't think it is necessary to go into that; the testimony of the previous witness won't be contradicted.

Mr. Moody: Very well, sir.

[fol. 302] The Court: It is cumulative; I don't believe it is necessary.

The Court will be in recess for ten minutes.

(Thereupon the Court recessed for 10 minutes and thereafter, all parties being present and represented as before the recess, Court reconvened and the following proceedings were had, to wit:)

Mr. Moody: Take the witness.

The Court: Any cross-examination?

Mr. Turner: No questions.

Proceedings Subsequent to Testimony

Mr. Moody: May it please the Court, Mr. Stull desires to be excused from further attendance on the Court in order that he may catch an airplane. In view of the statement of counsel for the defendant that his testimony will not be contradicted, why, we would like permission of the Court and counsel for the plaintiff that he may be excused.

Mr. Turner: That is satisfactory.

The Court: All right, he may be excused from further attendance.

Mr. German: Mr. Culton the same way.

Mr. Moody: At this point in the trial, as we had planned to introduce our testimony, there are some witnesses, that Judge German may wish to introduce whose testimony pertains particularly to Skelly Oil Company.

Mr. German: Your Honor, we have here Mr. Herndon to testify, and I would like to ask counsel if they are going to raise any question about whether that mimeographed copies of this November 30 certificate order, in the Michigan-Wisconsin case was delivered after 5:09 central time—5:09 P. M. on the 2nd? If you are not going to question that, why, I won't put Mr. Herndon on the stand because we won't need what he would testify to, but if you are, why, I want to put him on. In explanation of why we didn't send our Skelly telegram sooner.

[fol. 303] Mr. Turner: Well, as I stated, we were unable to fix, through people that we tried to get information from, about the time that this order was delivered to parties that we talked to, and they just could not recall the time with any degree of accuracy.

The Court: Well, I understand from your previous statement that you do not expect to offer any evidence.

Mr. Turner: No, sir, we do not.

The Court: As to the—in an effort to establish the time at which copies of the order were first delivered to people who were waiting there to receive copies?

Mr. Turner: That is correct, Your Honor; we have no evidence to offer to dispute it.

The Court: As a result of that statement of counsel, that counsel has heretofore made, I made the statement that I would believe the testimony of Mr. Stull.

Mr. German: Yes, sir, that's right.

The Court: His testimony being that he was there all day trying to get a copy and that he made inquiries of various people in an effort to get copies, and was not able to get one until 6:15.

Mr. German: And the others——

The Court: And it was within his knowledge that nobody else waiting there got a copy until 6:15, I am going to assume that to be a fact. It is uncontradicted.

Mr. German: Yes, sir. That being the case, Your Honor, we won't need to put Mr. Herndon on the stand, nor Mr. Ray. So, Mr. Moody, you may proceed.

Mr. Moody: Your Honor, with reference to this volume of the reports, of the Federal Power Commission, may I leave that with the Clerk?

The Court: No, I don't think you need to do that because it is my understanding that I may accept your statement as to what that volume shows, subject to Mr. Turner's verification.

Mr. Moody: Yes, sir.

[fol. 304] The Court: If he does not suggest that you were in error in any respect in the statement you made I will assume that statement to be true.

Mr. Moody: Now, Your Honor, on the further contention which the defendants make in this case which is that the certificate, or what is claimed by the plaintiffs to be a certificate of public convenience and necessity, was not such a certificate within the meaning of the contracts that existed, or alleged between the plaintiff and the defendants and that it did not represent a final administrative action of the Federal Power Commission as contemplated by the contracts, and in connection with that contention we desire to offer in evidence certain records from the proceedings in which the question was—as to the character of the order, was reviewed by the Court. And I anticipate that part of it can be disposed of by agreement.

Can it be agreed that on July 2nd, 1947, the Panhandle-Eastern Pipe Line Company filed in the United States Circuit Court of Appeals for the District of Columbia, a petition to review and set aside the orders of the Federal Power Commission being the—the order being the order of November 30, identified as a part of Plaintiff's Exhibit 6.

Mr. Turner: We will so agree.

Mr. Moody: Your Honor, then, it is stipulated that on July 2nd, 1947, Panhandle-Eastern Pipe Line Company filed in the United States Court of Appeals for the District of Columbia, case number 9,588, Panhandle-Eastern Pipe Line Company, petitioner, vs. Federal Power Commission, being a petition to review and set aside the order of the Federal Power Commission of date November 30, which is identified here as a part of Plaintiff's Exhibit 6, and being particularly the order referred to in the—referred to in cause G-669 pertaining to the rights—it is a part of Plaintiff's Exhibit 6 and being pages——

The Court: Oh, I think it is definite enough.

Mr. Moody: All right, sir.

The Court: You are referring to this November 30th order which is the crucial order in the lawsuit; we know what that is.

[fol. 305] Mr. Moody: Identify this as Defendants' Exhibit 30.

We offer in evidence Defendants' Exhibit 30, the order of the United States Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, the substance of which is that the cause came on for consideration on certain matters and the Court being of the opinion that the order of November 30, 1946, was not a final order because it required for completion the issuance of a supplemental order or orders, and the other orders above named not being final, and not having made final said order of November 30, 1946, it is now therefore ordered by the Court that the petition for review herein be and it is hereby dismissed without prejudice however to the right of the petitioner to petition for review of the order of November 30, 1946, after it shall have become final by issuance of a supplemental order or orders making the same final. It is further ordered by the Court that because of the dismissal of this case the motion of the National Coal Association, and the United Mine Workers of America, for leave to intervene, and for other relief, be, and it is hereby denied, without prejudice.

A per curiam opinion.

Mr. Turner: Of course, I take it that by stipulating that there was this, and also in connection with this order, that we are not to be taken to be understood as agreeing that

that is material to any of the issues in this case. We take the position it is not.

The Court: Well, do you object to the introduction of Exhibit 30 on the ground it is immaterial?

Mr. Turner: Yes, sir.

The Court: Objection is overruled; it may be admitted.

Mr. Turner: And we make the stipulation as to the appeal, subject to our contention that the appeal is immaterial.

The Court: That objection is overruled also.

Mr. Moody: I have got the date—Judge German calls my attention to the fact that I have the date here wrong, the [fol. 306] date is not July 2nd; that is the 2nd petition—I want to correct that date. Do you have the date of the first petition?

Mr. Turner: It is February 7, 1947, and it is cause No. 9,482.

Mr. German: He is talking about the date of the filing by Panhandle-Eastern of a petition for review.

Mr. Turner: The first one.

Mr. German: The first such petition was in cause No. —in the Court of Appeals, was in cause No. 9,482, and it was—that petition for review was filed——

Mr. Turner: February 7, 1947.

Mr. German: February 7, 1947; and it was in that case that this order Mr. Moody has just introduced, Defendants' Exhibit 30, was entered.

The Court: And it is so stipulated.

Mr. Turner: Yes, sir, subject to our objection as to its materiality.

The Court: All right.

Mr. Moody: Now then, gentlemen—identify this as Defendants' Exhibit 31.

Identify this as Defendants' Exhibit 32.

Identify this as Defendants' Exhibit 33.

We offer in evidence, Your Honor, so much of Defendants' Exhibit 31, being a transcript of the record in the Supreme Court of the United States, cause No. 147, October term, 1946, having been filed there in connection with a petition for writ of certiorari from the order entered by the United States Court of Appeals in cause No. 9,482, and we only offer so much of that as to show what the issue was in the Circuit Court—in the Court of Appeals.

Mr. Turner: Just a moment; if I may make objection there. We object to that, not on the ground of the lack of certification; we agree to the authenticity of that record, that it is correct. But we do object to it on the ground that it is not material to any of the issues in the case. I don't [fol. 307] know just how much of that, under the offer that he made, he is offering in evidence—so much of the issues—so much of the record there as may be considered material to the issues presented.

Mr. Moody: It will be the petition for review; that alleges the ground of attack on the order.

Mr. German: Petition for certiorari, do you mean?

Mr. Moody: No, this is the transcript that was filed in the United States Circuit Court of Appeals, of the proceedings in the United States—that was filed in the Supreme Court and it includes a record that was on file in the Court of Appeals in the District of Columbia and includes the petition—petition, and the answer of the parties.

Mr. Turner: Are you then offering that entire transcript?

Mr. Moody: Just a second. Here is all we offer—I was under the impression that the——

Mr. Turner: You would have no objection I take it to including also in your offer the motion to extend time of filing the transcript of record which begins on page 136 of this transcript, which is identified as Defendants' Exhibit 31?

Mr. Moody: I am perfectly willing for you to use it for the purpose of making that offer but I only desire to offer the petition, which shows the issues involved. We don't have available to us——

The Court: Isn't it enough, gentlemen—can't you stipulate that certiorari was denied by the Supreme Court upon the petition for review of the order of the Circuit Court of Appeals, the Judge of the Circuit Court of Appeals, which has been received in evidence?

Mr. Moody: Of course, that would not show the grounds of attack on the order, if we so stipulate. The petition is not so long——

The Court: Well, of course, the ultimate question is whether the Circuit Court of Appeals erred in holding that——

Mr. Moody: That's right—that's it.

[fol. 308] The Court: That the review sought was premature, because the order was not a final order—the administrative process had not been completed.

Mr. Moody: That is true, Your Honor. We think perhaps, Your Honor, that the pleading in the Circuit Court ought to be in evidence. That is the only part we offer.

Mr. Turner: That the what in the Circuit Court?

Mr. Moody: The petition in the Circuit Court ought to be in evidence; it appears in the transcript of the record of the Supreme Court of the United States; that is the only form in which we have it; the one I offered a while ago was in the second case.

Mr. Turner: Well, we object to it on the ground that it is not material. We don't make any objection as to its identification, authenticity, due to the fact it is not a certified copy, but we object to it on the ground it is immaterial.

The Court: I don't see why it would be material.

Mr. Moody: Well, it is offered for the purpose of showing the ground of attack in the Circuit Court, that is the ground on which it is offered.

The Court: Well, isn't the important thing, the ground for decision stated by the Circuit Court, regardless of any theories that may have been advanced by the parties?

Mr. Moody: Well, that may be correct, Your Honor.

The Court: I, of course, would like your comments on that suggestion. My thought is this: That if you have the—if we have in the record the judgment of the Circuit Court of appeals, that is we have the order of dismissal, and the grounds stated by the Court for the entry of that order, then, if it can be stipulated that certiorari was denied by the Supreme Court, in connection with the attempted review of the order, or rather, the attempt made to get the Supreme Court to review the order of the Circuit Court of Appeals, it seems to me that we would have everything in that is material with reference to this litigation.

Mr. Moody: Your Honor, we think that the basis upon [fol. 309] which the order was attacked in the court below is material and should be a part of the record in this case.

The Court: Well, I will let it go in; I don't think it is material.

Mr. Moody: All right, we offer in evidence Defendants' Exhibit No. 32, which is a certified copy of the petition for review—petition for certiorari filed in the Supreme Court of the United States.

Mr. Turner: We object to it on the ground previously stated, that it is not material to the issues in this case.

The Court: Objection overruled; it may be admitted in evidence.

Mr. Moody: And we offer in evidence Defendants' Exhibit No. 33 which is a certified copy of the order of the Supreme Court of the United States denying the petition for certiorari to the Court of Appeals for the District of Columbia.

The Court: Exhibit 33 is admitted.

Mr. Moody: In the first case mentioned —sir?

The Court: It is admitted.

Mr. Moody: Now, may I confer with counsel?

The Court: Yes.

Mr. Moody: We offer in evidence Defendants' Exhibit 34, copy of a lease between Michigan Consolidated Gas Company and Michigan-Wisconsin Pipe Line Company, as submitted and proposed by the Federal Power Commission, by the—Mr. Richberg in connection with his letter of December 10, 1946—I belive you offered that, did you not?

Mr. Turner: This is the lease filed pursuant to the terms of the letter——

Mr. Moody: The one that is tendered into the Commission: did you offer that?

Mr. Turner: Yes, we did.

Mr. Moody: Do you have that?

[fol. 310] Mr. Turner: It is in the record; it is in the deposition.

Mr. Moody: I think you offered Richberg's letter, but I don't think you offered that.

The Court: You are not certain whether the exhibit is in?

Mr. Turner: I am fairly certain it is, Your Honor; I can check right here to the exhibit number and we can answer you.

The Court: If there should be a duplication it would not make any particular difference.

Mr. Turner: Sir?

The Court: If there is any question about it it can go in; if there should be a duplication there would be no particular harm done.

Mr. Moody: Mr. Black tells me he finds it in.

Mr. Turner: As Plaintiff's Exhibit 14.

Mr. Moody: My recollection is this is an exhibit that is transmitted in Mr. Richberg's letter.

The Court: Exhibit 34 will be admitted; if there should be a duplication it won't make any particular difference.

Mr. Moody: Well, it is offered in evidence.

May we have a few minutes to confer?

Your Honor, I believe we have in now all the testimony we desire to offer. However, we would like a few minutes to make certain that we have not overlooked anything and make a check on it, which we can do very hurriedly.

The Court: Suppose you rest with the understanding that you may reopen to offer any evidence you may think of later.

Mr. Moody: All right, sir, we rest with that understanding. Thank you.

The Court: Any rebuttal evidence?

Mr. Turner: In view of the offer in evidence by the defendants of the petition to review filed in case No. 9,482, [fol. 311] United States Circuit Court of Appeals, District of Columbia, we desire to offer what has been marked as Plaintiff's Exhibit No. 73, a motion in that case entitled, motion to extend time of filing transcript of record, which motion begins on page 136 of the transcript of record, which is marked as Defendants' Exhibit 31.

The Court: All right, Plaintiffs' Exhibit 73 will be admitted.

Mr. Turner: These offers, if Your Honor please, are being made in view of the admission of the record as it has been offered by the Defendants over our objection; we taking the position that the proceedings in the Circuit Court and the Supreme Court of the United States on certiorari, are immaterial to the issues here, but in view of the admission of these other records in that case, to complete the picture, we have offered the last exhibit and we now desire to offer what has been marked as Plaintiff's Exhibit 74, which is a certified copy of a motion for stay, pending review, which was filed in the Circuit Court case mentioned, and also what has been marked as Plaintiff's Exhibit No. 75, which is a certified copy of an order denying the motion for stay in the Circuit Court case mentioned.

Do you care to see these?

Mr. Moody: So far as these instruments you offer are concerned, you are not offering them to establish the truth of anything stated in the pleadings, but only the fact that the pleading was made I assume, is that right?

Mr. Turner: We were not offering them as self-serving declarations, no, but the fact that there is the motion to stay that was filed in the case and the action of the Court.

Mr. German: Whose motion was that?

Mr. Moody: Panhandle-Eastern; I don't see any objection to that, Your Honor.

The Court: All right, Exhibits 74 and 75 will be admitted.

Mr. Turner. We rest, Your Honor.

Mr. Moody: Mr. Turner, may it be stipulated that the order of November 30, 1946, and subsequently amended by [fol. 312] other orders, that are now in evidence, is under attack in a suit pending in the United States Court of Appeals for the District of Columbia, brought by Panhandle-Eastern Pipe Line, being Case No. 9,588, and the type of the action is a petition to review and set aside certain orders of the Federal Power Commission including this order of November 30, 1946, as amended.

Mr. Turner: Well, let me say this in connection with your stipulation: We don't agree with your statement that the order of November 30, 1946, was in any way amended. We will agree that there is pending in the Circuit Court of Appeals an appeal from the order of November 30, 1946, that appeal being taken by the Panhandle-Eastern.

Mr. Moody: Now pending and undisposed of?

Mr. Turner: It is now pending in that Court.

Mr. German: When, and in what case number?

Mr. Turner: Do you want the case number?

Mr. Moody: That is the case.

Mr. Turner: Well, I don't know whether it is or not.

Mr. Moody: 9,588.

Mr. Turner: That is correct, filed July 2nd, 1947. We will agree to that. Although we submit if the Court please and stipulate to that effect, still we make our objection that it is immaterial to the issues in the case.

Mr. Moody: Your Honor, I don't believe we have anything else.

The Court: All right, the objection to the facts covered by the stipulation on the ground of immateriality is overruled and the stipulation may be received in evidence.

Mr. Turner: Yes, sir.

The Court: Now, do the defendants rest?

Mr. Moody: Yes, sir, I don't think we have anything else.

The Court: How much time does the plaintiff want to file briefs?

[fol. 313] Mr. Turner: Your Honor, could the briefing be done in this manner. Let briefs be filed simultaneously by both parties and then give each side so many days within which to reply or respond to the other side's brief?

The Court: I believe it would be satisfactory for the plaintiff to file briefs and the defendant answer, and the plaintiff reply. I don't want to have this briefing just go on and on and on like we have on these jurisdictional venue questions.

Mr. Turner: Ten days, Your Honor?

The Court: All right. How much time do the defendants want to answer?

Mr. Moody: Well, Your Honor, we can't do it in 10 days, so far as the Magnolia and the Stanolind are concerned. Mr. Black and I are in the general practice of law, and within the next 10 days I know that I have cases set for trial—and within the next 20 days. And we can't do it within the next 10 days or within the 10 days after we would get their brief. I can't. Do you think you can, Mr. Black?

Mr. Black: Another thing, if the Court please, we have to make arrangements to make—we have surrendered our exhibits, most of them. My file is completely riddled. We will have to get, through the Court Reporter, or some way, get these exhibits, otherwise we will not be able to call attention to what Your Honor mentioned, as the significant parts of the exhibit.

Mr. Turner: May I make the suggestion in that regard: That rather than to let that delay the submission of the matter to the Court on briefs, we will have no objection to their withdrawing such exhibits as they care to withdraw from the Reporter to be supplied back to the Reporter when they have finished with them.

The Court: All right.

Mr. Moody: Your Honor, I would suggest 30 days—30 days after their brief is filed.

The Court: I think that is too much time. I will give you 20 days.

[fol. 314] Mr. Moody: 20 days?

Mr. Black: After their brief is filed.

The Court: How much time do you want to reply, you gentlemen have to have a little more time, you have three defendants; you may have to collaborate some. I would like for the defendants to at least—at least the defendants

Magnolia and Stanolind who are represented by—to some extent by the same counsel, file one brief if you can.

Mr. Moody: Okay, we will do that, Your Honor.

The Court: The issues are the same with reference to those two.

Mr. Moody: Yes.

The Court: Skelly can file a separate brief if you like.

Mr. German: I would think this; we are likely to work pretty close together; we will endeavor not to duplicate, we will make cross-reference to the briefs of the other, adopt parts of them as much as we can.

The Court: Yes, sir. How much time will you want to reply?

Mr. Turner: 10 days, Your Honor; if we can get it in sooner than that, why we will.

The Court: All right, that is 40 days. That means that the briefs will all be in by April 12; will it be agreeable to set the case for oral argument on April 19?

Mr. Turner: If that is the earliest date that is convenient for the Court, why that will be agreeable with us.

Mr. Moody: Monday, the 19th of April?

The Court: You would rather have it the latter part of the week, Mr. Black?

Mr. Black: I would rather have it so that if we do have to resort to train travel——

The Court: Oh, I see.

Mr. Black: Had to make it on the train this time.

The Court: Well, Friday, the 16th—I think I can be ready [fol. 315] that soon. So I will set the case now for oral argument on Friday, the 16th. I will set aside that day; give you all the time you want for argument provided you can finish in one day.

Mr. German: At 9:30 or 10:00, Your Honor?

The Court: 9:30.

Now, you won't receive any further notice of the setting date—of the date for oral argument on the 16th, there won't be a notice go out from the Clerk, so you gentlemen will have that date in mind, April 16th.

Filed July 23, 1948.

IN UNITED STATES DISTRICT COURT

DEPOSITION OF LEON M. FUQUAY

The taking of the deposition of Leon M. Fuquay commenced at 10:00 A. M., Eastern Standard Time, on this the 26th day of January, 1948, in the office of the Secretary of the Federal Power Commission, 1800 Pennsylvania Avenue, Northwest, Washington, D. C.

The deposition is taken for use in the above-entitled cause and is taken before Mary K. Hoyez, Notary Public in and for the District of Columbia.

The deposition is taken pursuant to the notice of the plaintiff dated January 19, 1948, which notice together with acknowledgments of service thereof is attached to this deposition.

Appearances:

For the plaintiff, Phillips Petroleum Company: Harry D. Turner, Esq.

For the defendant Stanolind Oil and Gas Company: Charles L. Black, Esq., and Dan Moody, Esq.

For the defendant Magnolia Petroleum Company: Dan Moody, Esq.

For the defendant Skelly Oil Company: John F. Jones, Esq.

[fol. 316] LEON M. FUQUAY, being first duly sworn by the notary public above named, deposes and testifies as follows:

Direct examination.

By Mr. Turner:

Q. Will you state your name for the record, please?

A. Leon M. Fuquay.

Q. What is your occupation, Mr. Fuquay?

A. Secretary to the Federal Power Commission.

Q. Have you been served wi' a subpoena to appear and testify in the taking of this deposition?

A. Yes.

Q. How long have you been with the Federal Power Commission?

A. About 17 years.

Q. How long, approximately, have you been Secretary of the Federal Power Commission?

A. Over 10 years.

Q. As Secretary of the Federal Power Commission, are you the custodian of all of the official records of the Federal Power Commission?

A. Yes.

Q. Are you also the custodian of the official seal of the Commission?

A. Yes.

Q. Have you at our request, Mr. Fuquay, prepared certified photostatic copies of certain records of the Commission?

A. Yes.

Q. Have those photostatic and certified copies that you have prepared at our request, remain in your possession or the possession of personnel in your office until this time?

A. Yes.

Q. And you now have that material before you?

A. Yes.

Q. Do you have a certified copy of the docket sheets in Proceeding G-669 in the Federal Power Commission?

A. Yes.

Q. May I see it, please?

A. Yes.

(Document handed to counsel.)

Mr. Turner: Will you mark this as an exhibit?

(The document referred to was thereupon marked by the reporter for identification as Exhibit 1.)

By Mr. Turner:

Q. Mr. Fuquay, I hand you what is marked as Exhibit 1 and ask you to state what that is please.

A. True copies of the docket sheets in the Matter of [fol. 317] Michigan-Wisconsin Pipe Line Company, Docket G-669.

Q. And those docket sheets are kept by what section of the Federal Power Commission?

A. They are maintained by the Docket Section which is under the supervision of the Office of the Secretary.

Q. Under your supervision and control?

A. That is correct.

Q. Would you state what the purpose and function of the docket sheets are?

A. The purpose is to facilitate the Commission's work. The sheets serve somewhat as an index to the docket files.

You might say that for 16 years the Commission operated without any docket sheets whatever. These sheets were started about 1936 or 1937, both for the convenience of the staff and for the convenience of the public.

Q. Are they a chronological index of the proceedings in a given matter before the Commission?

A. Yes, they purport to be that.

Q. And the actual documents and orders and other papers referred to in the docket sheets are on file in your office as Secretary of the Commission?

A. Yes.

Q. And are the official records of the Commission?

A. That is right.

Q. How are the dates that are shown on the docket sheets arrived at? What are they taken from?

A. In the case of the filing the entry is made as of the date of the filing. In the case of an action of the Commission the entry is made as of the date of the Commission's action.

Q. That is, if an order is made by the Commission in a given proceeding, that order will bear a date and the Docket Clerk then puts down as the date on the docket sheet the date as it appears on that order?

A. That is correct, as of the date of the adoption of the order.

Q. And any correspondence that may be sent out by the Commission such as a letter or a telegraphic notice—the date of that letter or telegram will be the date that is shown by the Docket Clerk on the docket sheet?

A. Yes.

Mr. Moody: Your question was leading, Mr. Turner. I [fol. 318] desire to note an objection made for that reason. I don't think it was exactly clear either.

By Mr. Turner:

Q. On letters that may be sent out by you as Secretary of the Commission, from what is the date taken that is shown on the docket sheet?

A. The date which is on the letter, the date when the letter was transmitted.

Q. The date when the letter is sent out. I mean, Mr. Fuquay, by "sent out," sent from the Commission to someone outside such as a party in a given proceeding.

A. That is correct.

Q. And from what is the date of the telegram taken, that is, the date that is shown on the docket sheet?

A. The date on which the telegram was dispatched.

Q. Mr. Fuquay, do you have a certified copy of the application of Michigan-Wisconsin Pipe Line Company in G-669?

A. Yes, I do have here a copy of the application filed on September 24, 1945, in the Matter of Michigan-Wisconsin Pipe Line Company, Docket No. 669.

Mr. Turner: May I have that marked for identification?

(The document referred to was thereupon marked by the reporter for identification as Exhibit No. 2.)

By Mr. Turner:

Q. Is that the certified copy that is marked Exhibit 2?

A. Yes.

Q. Do you have a certified copy of the first amendment to the application just mentioned?

A. Yes, I have a certified copy of the amendment to the application filed on March 13, 1946.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 3.)

By Mr. Turner:

Q. Is that the document marked by the notary public as Exhibit 3?

A. Yes.

Q. Do you have a certified copy of the second amendment to the application which we have mentioned?

A. Yes, I do.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 4.)

[fol. 319] By Mr. Turner:

Q. Is that the copy that has been marked by the notary as Exhibit 4?

A. Yes.

Q. Do you have a certified — of the order of the Commission of November 30, 1946, entitled "Findings and Order Issuing Certificate of Public Convenience and Necessity" in Proceeding G-669?

A. Yes, I do.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 5.)

By Mr. Turner:

Q. Is that the exhibit which you have before you which has been marked by the notary public as Exhibit 5?

A. Yes.

Mr. Moody: Will you wait just a moment until we examine that?

(Exhibit 5 for identification handed to Mr. Moody by Mr. Turner.)

By Mr. Turner:

Q. Do you have a certified copy of the Minutes of the meeting of the Commission of November 30, 1946?

A. Yes.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 6.)

By Mr. Turner:

Q. I hand you what has been marked by the notary as Exhibit 6 and ask you to state what that is.

A. A full true and complete copy of the Minutes of the Two Thousand One Hundred and Nineteenth Meeting of the Commission held on November 30, 1946, including the documents appended thereto.

Mr. Moody: May we see that just a second?

(Exhibit 6 for identification handed by Mr. Turner to Mr. Moody.)

By Mr. Turner:

Q. Do you have a certified copy of a telegram sent by yourself in Docket G-669 on November 30, 1946?

A. Yes.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 7.)

Mr. Moody: When you stated your question there you [fol. 320] assumed the date it was sent, Mr. Turner. Do you want to agree that any objections can be made at the time of the trial?

Mr. Turner: I don't mean to be leading as you suggest that I am, except on the introduction of the records. If, however, I do lead the witness and you care to make any objection in that regard, I would appreciate your stating it at this time.

Mr. Moody: All right. In that question you assume the date the telegram was sent.

By Mr. Turner:

Q. I hand you what has been marked by the notary as Exhibit 7 and ask you to state what it is, please, sir.

A. It is a true copy of a telegram to Michigan-Wisconsin Pipe Line Company and to parties listed on attached distribution list, dated November 30, 1946, in the Matter of Michigan-Wisconsin Pipe Line Company, Docket No. 669.

Q. Do you have an acknowledgment of service dated December 2, 1946, in Proceeding G-669?

A. Yes.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 8.)

By Mr. Turner:

Q. I hand you what has been marked by the notary as Exhibit 8 and ask you to state what that is, Mr. Fuquay.

A. It is a true copy of a Certificate of Service dated December 2, 1946, from Michigan-Wisconsin Pipe Line Company, Panhandle Eastern Pipe Line Company and Michigan Gas Storage Company in the Matter of Michigan-Wisconsin Pipe Line Company, Docket No. G-669, and Panhandle Eastern Pipe Line Company, Docket No. G-706.

Mr. Moody: May I look at it a second? I think you said "from" when you meant to say "to."

(The answer was thereupon read by the reporter.)

Mr. Moody: I am sorry. I understand now.

By Mr. Turner:

Q. Do you have a Letter of Service dated December 2, 1946, in Proceeding G-669?

A. Yes.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 9.)

[fol. 321] By Mr. Turner:

Q. I hand you what has been marked as Exhibit 9, Mr. Fuquay, and ask you to state what that is.

A. It is a true copy of a letter and distribution list dated December 2, 1946, to Michigan-Wisconsin Pipe Line Company from Leon M. Fuquay in the Matter of Panhandle Eastern Pipe Line Company et al., Docket Nos. G-669 et al.

Q. That appears in the files of the Commission?

A. It does.

Mr. Moody: Let me see that, please.

(Exhibit 9 handed by Mr. Turner to Mr. Moody.)

By Mr. Turner:

Q. That refers to three registered letter numbers. You have registry receipts for those, the first one shown being No. 443504—return receipts?

A. Yes.

(The three documents referred to were thereupon marked by the reporter for identification as Exhibits 10, 11 and 12:)

By Mr. Turner:

Q. I hand you what have been marked as Exhibits 10, 11 and 12 for identification by the notary, and ask you to state what those are, Mr. Fuquay.

A. Exhibit 10 is a true copy of a return receipt No. 443504 dated December 4, 1946, in the Matter of the Order of November 30, 1946, Docket G-669.

The second is a true copy of return receipt No. 443505 dated December 3, 1946, in the Matter of the Order of November 30, 1946, Docket No. G-669.

The third is a true copy of a return receipt No. 443506 dated December 5, 1946, in the Matter of the Order of November 30, 1946, Docket No. G-669.

Q. You referred, Mr. Fuquay, to each one of these return receipts being dated a certain date. Is the date that you stated on each one the date of delivery by the postal department of the letter to the addressee of the letter?

A. That is indicated on the return receipt, yes, that is correct.

Q. Do you have a certified copy pertaining to the minutes of the meeting of the Federal Power Commission on December 3, 1946?

A. Yes.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 13.)

[fol. 322] By Mr. Turner:

Q. I hand you what has been marked by the notary as Exhibit 13 and ask you to state what that is, please, sir.

A. It is a true and correct copy of a portion of the Minutes of the Two Thousand One Hundred and Twenty First Meeting of the Federal Power Commission held on December 3, 1946.

Q. Now, referring back to the order of the Commission of November 30, 1946, identified here as Exhibit No. 5, were you present at the meeting of the Commission on that date, November 30, 1946?

A. Yes.

Q. At the time the Commission considered its order in the proceeding with which that order of November 30, 1946, was involved, did the Commission have before it anything in writing as to the form of the order or the proposed order?

A. Yes, it did.

Q. What did they have before them?

A. They had before them a draft of an order that they considered adopting.

Q. Did each member have a draft of the proposed order?

A. Yes.

Q. Did you have a draft of the order?

A. Yes.

Q. And you were present throughout the meeting of the Commission?

A. Yes.

Q. It is the practice and custom of the Commission for you to attend the meetings of the members of the Commis-

sion whereby the Commission arrives at its orders in the various matters pending before the Commission?

A. Yes, when I am present.

Q. Now, was that draft of a proposed form of orde before all the members of the Commission and before yourself at the start of the meeting of the Commission on November 30, 1946?

A. Yes.

Q. Now, is that in accord with the practice of the Commission, to have before the members of the Commission and any other personnel who might be present at the meeting of the Commission—is it the practice to have in writing proposed forms of orders?

A. It is the practice to have before the members of the Commission and the Secretary, proposed drafts of orders. You refer to other members of the staff—

Q. Who might properly be present. I don't know who they may be, but at least it is customary for each member of the Commission and you, as Secretary, to have in writing at the time the Commission considers an order in a given [fol. 323] matter, a copy of the proposed form of order?

A. Yes, that is correct. That does not mean, of course, that the Commission could not have at some previous date discussed the matter in a general way without having the draft of the order before it, but it is customary at the time the Commission acts on an order to have a draft of the order proposed to be adopted before them.

Q. Is it the practice and custom of the Commission when it adopts and prescribes an order, to have the full terms and provisions of that order specified in writing at the time the order is adopted or prescribed?

A. Yes.

Q. And then is it the practice of the Commission to do anything further after it has adopted a form of order and prescribed its terms, before you serve the order which the Commission has adopted upon the parties in the case?

A. No.

Q. After the Commission adopts its form of order at a meeting in which an order is prescribed and adopted, then what is the next step relative to serving the order upon the parties, or copies of the order upon the parties?

A. The next step is taken by me and involves reproducing the order so that copies can be furnished to all the parties.

Q. Now, when the Commission fixes and adopts an order at its meeting at which an order is adopted, you then have in writing on your copy of the proposed order that was submitted to the Commission, the full terms and provisions of the order of the Commission in that particular case?

A. Yes, I do.

Q. And is it necessary for you when you reproduce that complete copy that you have—is it necessary for you to resubmit that to the Commission or any member of the Commission before you release it and serve it upon the parties?

A. No.

Q. Now, is that the practice of the Commission that has been in effect here for a number of years?

A. Yes, it is.

Q. Referring back particularly, Mr. Fuquay, to this order of November 30, 1946, identified as Exhibit No. 5, at the meeting on that date I understood you to say that the members of the Commission, as well as yourself, had at the start of the meeting a draft of the proposed order before each one of you.

A. Yes.

[fol. 324] Q. Now, were there any changes made by the Commission in the draft copy of the order?

A. Yes, there were a good many changes made.

Q. Now, those changes were made by the Commission, that is, the majority of members of the Commission?

A. That is right.

Q. And as those changes were made what did you do, if anything, relative to your draft copy of the proposed order?

A. I made the changes on my draft which is regarded as the master draft.

Q. Did you make the changes generally or word for word as the Commission directed you to make those changes?

A. I made them word for word as they directed.

Q. As those various changes were made in the draft of the proposed order, would you read the final wording of it back to the Commission?

A. Yes.

Q. When the Commission adopted the order and took its action on November 30, 1946——

Mr. Moody: I object to that as leading.

By Mr. Turner:

Q. On November 30, 1946, did you have written down on your copy the full complete text of the order of the Commission——

Mr. Moody: I object to that as calling for a conclusion.

By Mr. Turner:

Q. —as prescribed by the members of the Commission?

Mr. Moody: The same objection to the question as completed.

The Witness: Yes.

Mr. Jones: At what time was this supposed to be?

Mr. Turner: On November 30, 1946.

By Mr. Turner:

Q. Did you or did you not, Mr. Fuquay, have before you at the time the meeting of November 30, 1946, was adjourned, a complete full text of the order adopted by the Commission on November 30, 1946?

A. I did have.

Mr. Moody: Just a minute. The same objection that it is [fol. 325] leading and suggestive and it assumes the legal effect of what he is attempting to show the Commission did.

By Mr. Turner:

Q. Insofar as the order of November 30, 1946, is concerned, which has been identified as Exhibit No. 5, when the Commission adjourned on November 30, 1946, was there anything further to be done by the Commission, or any member of the Commission insofar as the terms or provisions of the order of November 30, 1946, were concerned?

Mr. Moody: That calls for a conclusion of the witness. It is objected to for that reason.

The Witness: The Commission completed its action and formally voted on the order which was before me as to all of its terms and conditions on November 30, 1946, as the record so shows.

Mr. Moody: Will you read that back, please?

(The last answer was thereupon read by the reporter.)

Mr. Moody: We object to that as calling for a conclusion of the witness. It involves secondary evidence and the records they have will be the best evidence.

By Mr. Turner:

Q. Were you then authorized, Mr. Fuquay, to release the full text of the order of November 30th, 1946, identified as Exhibit 5?

Mr. Moody: That is objected to as calling for a conclusion of the witness.

The Witness: I have general authority to release the Commission's actions.

By Mr. Turner:

Q. When they adopt an order, immediately upon their adoption of the order?

A. That is correct.

Q. Such as was the case with the order of November 30, 1946, identified as Exhibit 5?

A. Yes.

Mr. Moody: We object to that question and to the answer because of the assumption with respect to the nature and character of the instrument referred to.

By Mr. Turner:

Q. Referring back, Mr. Fuquay, to the order of No-
[fol. 326] vember 30, 1946, identified as Exhibit No. 5, were the terms and provisions of that order word for word specified and fixed by the majority of the members of the Commission?

A. They were.

Mr. Moody: Wait a minute. Will you read that back, please?

(The last question was thereupon read by the reporter.)

The Witness: You should understand there that all five members of the Commission were present and any member of the Commission may have made suggestions as to the form of the order.

Mr. Moody: We object to the question and the answer because it is secondary evidence. The best evidence is the records of the Commission.

By Mr. Turner:

Q. Mr. Fuquay, when I used the expression "majority of the Commission" I meant at least the majority of the members of the Commission adopted that particular language and prescribed the particular language of the order.

A. That is correct.

Q. In other words, Mr. Fuquay, were the full terms and provisions of the order of November 30, 1946, identified as Exhibit 5, fixed by the members of the Commission themselves or were they fixed by you?

Mr. Moody: That calls for a conclusion of the witness. The records of the Commission form the best evidence and the answer is secondary evidence.

The Witness: They were fixed by the Commission itself.

By Mr. Turner:

Q. And when were they fixed, Mr. Fuquay?

A. On November 30, 1946.

Mr. Moody: The same objection to that question and answer.

By Mr. Turner:

Q. Insofar as releasing the full text copies of the order of November 30, 1946, was concerned, was it then merely a mechanical process of reproducing the full text of the order?

A. Yes, it was.

[fol. 327] Mr. Moody: That calls for a conclusion and is objected to for that reason.

Mr. Turner, it is our contention in this case that the instrument which has been identified by the witness as Exhibit 5 is not in law an order. Now, then, in your questioning you have usually, if not constantly, referred to it as an order rather than an exhibit.

May it be understood that each time you do so refer to it in future examination that it is understood we are object-

ing to it because it is suggestive and embraces your legal conclusion as to the effect of the instrument to which you refer?

Mr. Turner: If I understand you correctly, any time I refer to the order of November 30, 1946, Exhibit 5, you object to a question using that language on the ground that Exhibit 5 is not in fact an order?

Mr. Moody: That is right.

Mr. Turner: And you want that understood throughout.

Mr. Moody: Yes.

Mr. Turner: I will so agree.

By Mr. Turner:

Q. If, Mr. Fuquay, on November 30, 1946, you had had the copies of the master draft of the order as was fixed by the Commission on November 30, 1946, could you have then released the copies to the parties and anyone else who might have desired to have them?

A. Yes, I could.

Q. It was merely a matter of the mechanical practicability as to when full text copies would be made available to the parties and to the public?

Mr. Moody: That is a leading question and is objected to.

By Mr. Turner:

Q. Was it merely a matter of mechanical practicability as to when copies would be made available—full text copies would be made available to the parties and to the public, of the order identified as Exhibit 5?

A. Yes, it was.

Mr. Jones: Since Mr. Moody doesn't like to lodge all the objections I will object to that on the same ground as previously objected to.

[fol. 328] By Mr. Turner:

Q. I refer to what has been identified as Exhibit No. 7, Mr. Fuquay. On the first page of that telegram as appears in your files, down at the lower left-hand corner, there are certain initials. Would you please explain those initials?

A. Those initials would indicate that I dictated the telegram.

Q. Does it indicate to whom the telegram was dictated?

A. A stenographer with the initials "C. W."

Q. And the date on the telegram?

A. Dictated on November 30, 1946.

Q. And then up in the upper right-hand corner, the typewritten portion, there is a date. What does that indicate?

A. It indicates it was dispatched on November 30, 1946.

Q. Then, there is a stamped mark that recites "Federal Power Commission docketed November 30, 1946, Docket Section, Secretary's Office."

What does that indicate?

A. It indicates it was listed on the docket sheet under the date on which it was supposed to have been transmitted.

Q. That is, the docket date coincides with the date of your telegram of November 30, 1946. Is that correct?

A. Yes.

Q. Now, also on this exhibit there is written out certain initials. What initials are those?

A. Those are "L. M. F." indicating they were placed there by myself.

Q. And when did you dictate this, that is, what date?

A. The record indicates that it was dictated on November 30, 1946.

Mr. Black: I object to that as unresponsive.

By Mr. Turner:

Q. After the Commission adopted its order of November 30, 1946, did you send this telegram, Mr. Fuquay?

A. The record shows it was dictated on November 30, 1946. I did not personally deliver it to the telegraph office. However, I am confident it was so delivered under my supervision.

It is a matter for the record to show whether it was delivered to that office or not.

Mr. Moody: It is a matter of conclusion and opinion of the witness, speculative and not confined to facts within his [fol. 329] knowledge, as appears from his answer, and objected to for that reason.

By Mr. Turner:

Q. How do you send telegrams, Mr. Fuquay? What is your practice, as far as you personally are concerned, in sending a telegram out of your office?

A. That would vary according to the necessities of the case. I think normally we would send a telegram down through the mail room and they would ring for a telegraph boy to come over and get it. I do not know whether this was sent that way or not.

Q. Well, as far as you are concerned, you dictated this telegram marked Exhibit No. 7 yourself?

A. Yes, I did.

Q. And then after your secretary typed up the telegram she brought the dictated and typed-up copy of the telegram back to you?

A. Yes.

Q. And then did you look it over and see that it was satisfactorily typed up as you had dictated it?

A. Yes, sir.

Q. Then, did you or did you not instruct your secretary to send out that telegram?

A. I did instruct her to send it out.

Q. And that was on what date, Mr. Fuquay?

A. According to the record it would have been on November 30, 1946.

Mr. Moody: We object to that answer because it is not responsive and does not answer the question.

Mr. Black: We also object that if you are calling for what the record shows the record would be the best evidence and the original statement of the witness about what the record shows is superfluous.

By Mr. Turner:

Q. Did you have the full text copy of the order of the Commission of November 30, 1946, identified as Exhibit 5, before you when you sent this telegram out?

A. Yes, I did.

Q. And was this telegram sent out with the authority of the Commission?

Mr. Jones: We object to that as calling for a conclusion of the witness. He may state what transpired in connection with this.

[fol. 330] The Witness: The Secretary has general authority to notify the parties as to the Commission's action. Therefore this telegram was sent with the Commission's authority.

Mr. Moody: The answer calls for a conclusion of the witness. The first part of it is not responsive. The rules of the Commission prescribing the duties of the Secretary would be the best evidence.

By Mr. Turner:

Q. Was there any reason, Mr. Fuquay, why the order of November 30, 1946, could not have been released to the press on the evening of November 30, 1946?

Mr. Black: That calls for an opinion of the witness. We object to it on that ground.

The Witness: There might have been administrative difficulties in releasing it as a whole for the reason I stated before.

By Mr. Turner:

Q. You mean by that——

A. The mechanical reproduction of additional copies.

Q. But as far as letting the press know of the action which had been taken by the Commission on November 30, 1946, was there anything to preclude the press from being so informed?

A. No, there was not.

Q. Now, you have stated, Mr. Fuquay, that on November 30th you had the full text of the order of the Commission of November 30, 1946, identified as Exhibit 5, before you. Then did you cause that order to be reproduced or mimeographed copies to be made of it?

A. Yes.

Q. Was that mimeographing done and completed on December 2, 1946? Had you mimeographed copies by December 2, 1946?

A. The letter of service contained in the files is dated December 2, 1946 and states that it is enclosing orders entered by the Commission on November 30, 1946 in this docket.

Q. Well, you would have to have them mimeographed in order for that to be accomplished?

A. To have been served upon the large list of parties, that would have required reproducing the order from the master draft which I had on November 30.

Q. So this letter of service marked Exhibit 9 reveals [fol. 331] that it had been reproduced by December 2nd?

A. Yes, it indicates that.

Mr. Moody: We object to that as leading, calling for a conclusion of the witness, and argumentative. The letter, whatever it is or whatever it shows, and its legal effect, speaks for itself.

By Mr. Turner:

Q. And mailed to the parties on that date, December 2, 1946?

A. It indicates it was so mailed, yes.

Q. Now, Mr. Fuquay, referring to this Exhibit No. 9, what is the date of the letter shown on that exhibit?

A. In the upper right-hand corner, and then in the lower left-hand corner, there is a date December 2, 1946.

Q. In the upper right-hand corner, is that date December 2, 1946 put on there by typewriter, by machine, or by hand?

A. It appears to be the stamp which is used in our mail room.

Q. So that the dating will be understood, will you explain the practice of your office, the Office of the Secretary of the Commission, in the dating of letters such as that going from the Commission to people outside the Commission?

A. The practice is to send them to the mail room undated and they are dated at the time they are transmitted.

Q. They are dated by what section?

A. By the mail unit in the Mails and Files Section.

Q. And they are dated by that unit when the letters are actually sent out into the mail?

A. That is correct.

Q. And then they are docketed and shown on the docket sheets under what date?

A. They are docketed in accordance with the date on which the action took place. For example, this letter indicates it was transmitted on December 2, 1946 so it is docketed as of December 2, 1946.

Q. Now, referring, Mr. Fuquay, to Exhibits 10, 11 and 12, the return receipts, Exhibit No. 10 shows the date of delivery of the registered letter to the recipient as when?

A. It appears to be December 4, 1946.

Q. And then in the ordinary course of the mails that is sent by the postal department back to your office, the Office of the Secretary of the Commission?

A. Yes.

[fol. 332] Q. Where it is then placed on file?

A. Yes.

Q. And then will it be docketed?

A. I don't see any docket stamp on that.

Q. Well, is it stamped by any person in your department relative to any date of receipt or otherwise?

A. Yes, it indicates it was received by the Federal Power Commission December 6, 1946.

Q. That is when it came back through the mails and was handed to your office?

A. That is what the stamp indicates, yes. That appears to be the official stamp used in the mail room.

Mr. Black: We object to that question and answer and similar questions because they call upon the witness to state the contents of the records, and the applicable statute provides that you will prove the records. They are not proved by oral testimony. They are to be proved by proper certificate.

By Mr. Turner:

Q. I hand you what has been marked Exhibit 11 and ask you if the stamped date on that exhibit of December 4, 1946 indicates the date the return receipt was received by your department?

A. There is a stamp which appears to be the official stamp used in the Commission's mail room indicating it was received by the Federal Power Commission on December 4, 1946.

Mr. Moody: The same objection to that question and answer that Mr. Black made to the previous one.

By Mr. Turner:

Q. Is that also true of the date December 9, 1946 appearing on Exhibit 12?

Mr. Moody: The same objection to that question as Mr. Black made to the preceding question and it like its predecessor is leading.

The Witness: Yes.

By Mr. Turner:

Q. Mr. Fuquay, Exhibit 7 indicates that the parties were advised by wire on November 30, 1946 of the Commission's action.

Mr. Moody: Are you through with your question? If [fol. 333] you are, we object to it because it is leading and the record speaks for itself.

The Witness: There is a copy in the files of a telegram to the Michigan-Wisconsin Pipe Line Company and to the parties listed on an attached distribution list. It is dated November 30, 1946 and relates to Docket G-669.

By Mr. Turner:

Q. Now, is it the practice to hand copies of orders adopted by the Commission to the parties who may have representatives present here in Washington when those copies are available?

A. That is sometimes done, yes.

Q. In that event you get a certificate of service or an acknowledgement of service signed by the party's representative?

A. That is sometimes done.

Q. Who may happen to be here?

A. Yes.

Q. In addition to that is it your practice to mail out copies according to the addresses which you have given into the record?

A. I don't know that we always duplicate the service in that way but I think it is sometimes done.

Q. The record indicates you did do that in this case.

A. I would have to check the record on that to see whether I did or not. I have before me a Certificate of Service signed on behalf of Michigan-Wisconsin Pipe Line Company by a Mr. R. E. Generally, and I also have before me carbon of a letter addressed to Frank L. Conrad, President, Michigan-Wisconsin Pipe Line Company, dated December 2, 1946, enclosing orders entered by the Commission on November 30, 1946 re Panhandle Eastern Pipe Line Company et al, Docket Nos. G-669 et al.

Q. In addition to the acknowledgement of service and the mailing on December 2, 1946, Mr. Fuquay, were copies

also made available to the public or anyone who might desire to obtain the full text copy of the order?

A. I don't know.

Q. Well, is that your usual practice?

A. To make available copies to the public at the time they are served upon the parties?

Q. Yes.

A. Yes. It is our practice to make them available to anybody who asks for copies as long as we have got them. [fol. 334] Q. Now, the copies of the order that were sent to the parties as shown by Exhibit No. 9 and, as served upon parties who had their representatives present as shown by Exhibit 8, were those copies, Mr. Fuquay, word for word correct full copies of the order as had been entered by the Commission on November 30, 1946?

Mr. Moody: Just a minute. We object to that because that calls for secondary evidence. An order as adopted by the Commission, if there was an order adopted by the Commission, would be the best evidence of what its terms and conditions were, and what its text was and, copies, if they are available of the instruments that accompanied the letter referred to of which Exhibit 9 purports to be a copy, would be the best evidence of the contents of the text of any enclosure that went with Exhibit No. 9 and, to attempt to have the witness testify as to a comparison between the two instruments is hearsay and not the best evidence, neither of the instruments being before him.

By Mr. Turner:

Q. Are you sure what the question is?

A. Yes. They were true copies, yes.

Q. Now, Mr. Fuquay, is it the practice of the Commission to have minutes of each meeting which it has made up?

A. Yes.

Q. And who makes up the minutes? Who actually writes up the language of the minutes?

A. The Secretary is responsible for having them written. The Secretary does not do the actual typing.

Q. You are the one who composes the minutes. Is that correct?

A. Yes, sir.

Q. Is that contrary to the practice in so far as the terms of orders are concerned?

A. Yes.

Q. The terms of orders are fixed by the Commission and composed and proposed by them——

Mr. Moody: That is leading.

Mr. Black: We object to that question and all other questions that have reference to the draft of the order adopted by the Commission, because that draft has not been produced and offered as an exhibit and, we object [fol. 335] to the witness testifying about something that is not available for examination.

By Mr. Turner:

Q. —whereas the minutes of the meetings are composed and the language of those minutes fixed by you—written out by you——

Mr. Moody: Is that a part of the same question that Mr. Black objected to, Mr. Turner? Do you intend it as such?

Mr. Turner: Yes, I am just trying to get a statement of the practice of the Commission in the writing up of the orders and writing up of the minutes. We can let the record show that you make the last objection which Mr. Black just dictated into the record to this entire question and I ask, so that the witness will be able to understand clearly, that the question in its entirety be read back to the witness with the understanding that your objection which you made in between stands for the question as a whole.

Mr. Moody: All right.

Mr. Black: The objection I was making was that you had not produced what you call a draft of the order as adopted by the Commission and there is no way to examine the witness. You are just putting in his recollection, his oral recollection of that at this time, which may or may not conform to what you call a draft of the order adopted by the Commission.

Mr. Turner: I don't believe that you understand the question as I intended to ask it. So that there will be no misunderstanding about the intent of the question I will restate the question.

Mr. Moody: Pardon me. Before you do that I would like to have it understood, Mr. Turner—I would like for

you to understand—that throughout the examination you have been asking the witness about the text of the order approved by the Commission which apparently the Secretary had and of which he says he made up copies, as I understand, and the copies he says are correct copies, but the original instrument to which you have referred so frequently has not been produced, and we would like now, in [fol. 336] view of the federal rules of civil procedure with reference to the taking of depositions, to call your attention to that fact and that we are objecting to all of those questions and answers because the best evidence has not been produced and they involve hearsay, the recollection of the witness and his opinion as to whether or not the copies he made or caused to be made are correct copies of what he testifies the Commission had before it.

By Mr. Turner:

Q. Is it the practice of the Commission and has it been for a long number of years, for the Commission—and I mean by the Commission, the members of the Commission—to prescribe the full terms of orders adopted by it; whereas in the write-up of the minutes of meetings of the Commission is it the practice for you to use your own language in so far as the write-up of the minutes of the meeting are concerned, to be submitted to the Commission later—the language that you have written up?

Is my question clear?

A. Yes, and that is the practice as you have stated it. The Secretary recites in the minutes, or itemizes lists of things and states that the Commission did on a certain date take action or adopt those orders and he presents those at a subsequent meeting.

The Commission when it approves those minutes approves my statement or recitation of what it did at the last meeting. Sometimes it involves a dozen or more orders.

Q. Referring to what has been identified as Exhibit 6, there is attached to Exhibit 6 three copies of orders.

Now, those orders or the terms and provisions of them—are they prescribed by the Commission in full final form when they are adopted by the Commission?

A. Yes.

Mr. Moody: We object to that. What you have referred to there as exhibits attached to the minutes, Mr. Fuquay, are typed copies of some other instrument, are they not?

The Witness: I have here photostatic copies.

Mr. Moody: I mean the originals of which these photostats were made are copies of some other documents as they are attached to the minutes, are they not?

[fol. 337] The Witness: These are true photostatic copies of the order entered by the Commission on November 30, 1946.

Mr. Moody: What I am getting at is: that photostat you have in your hands is a photostat of an instrument which purports to be a copy of the original, is it not?

The Witness: It is a full true and complete copy of the minutes of the Commission.

Mr. Moody: I don't believe you understand me.

Mr. Turner: Is this for the purpose of making an objection?

Mr. Moody: For the purpose of an objection, yes.

What I am getting at, Mr. Fuquay, is this: This first instrument right here (indicating) is a photostatic copy, is it not—it is numbered No. 22461 in the upper right-hand corner and attached to Exhibit 6—that is a photostat of a copy of the original paper, is it not?

The Witness: It is a photostat of the signed and sealed minutes of the Federal Power Commission contained in its minute books.

Mr. Moody: All right, sir, but the instrument itself to which I just directed your attention was made as a copy of another paper?

The Witness: It is a photostatic copy.

Mr. Moody: I am talking about the paper which you photostated, of which the instrument you have your hand on there, identified by that number—I am not talking about the photostat—it was a copy of another paper, was it not?

The Witness: It was made under my supervision from the master draft which the Commission formally acted upon.

Mr. Moody: Then it was a copy of another paper, wasn't it?

The Witness: If you call it a copy or not, it is written out and signed by me and the Chairman.

Mr. Turner: Is this for the purpose of making an objection or are you cross-examining, Mr. Moody?

[fol. 338] Mr. Moody: It is for the purpose of making an objection, Mr. Turner.

The master copy is the original, is it not?

The Witness: I don't know. I have a master before me when they act, yes.

Mr. Moody: The master copy was copied, wasn't it?

The Witness: Yes, that was reproduced in a different form and on a different type of paper possibly.

Mr. Moody: Whatever the type of paper was, copies were made of the master copy, were they not?

The Witness: Yes.

Mr. Moody: And the photostat which you have there and to which I directed your attention, is a photostat of one of the copies of the master, is it not?

The Witness: Yes,

Mr. Moody: We object because it is secondary evidence.

Mr. Black: And because the master copy has not been produced. The witness has already testified that certain notations were made on it and a copy bearing those notations has not been produced.

By Mr. Turner:

Q. Setting aside for the moment my question which I asked, Mr. Fuquay—and I will come back to that in a moment, but getting to the various features Mr. Moody inquired about in his interrogation of you, the master draft copy of the form of order that you referred to such as you had in your hands on November 30, 1946—is that a working draft, a working paper?

Mr. Moody: That calls for a conclusion of the witness. The instrument would speak for itself. We object to it for that reason.

The Witness: The procedure is to have a draft of an order which it is proposed to act upon and the Commission may change that in many respects or it may not make any changes, but if it does make changes they are made right there in the meeting by the commissioners. The Secretary [fol. 339] makes all the changes on the master draft and if the Commission is ready to act it acts upon that draft with the changes made and entered into the draft.

By Mr. Turner:

Q. And what you have referred to as the master draft—Is that a working paper so far as you are concerned?

A. It causes me to do quite a lot of work sometimes.

Q. That is, Mr. Fuquay, you have a master draft before you whereon you note all the changes that may be prescribed by the Commission. Is that correct?

A. Yes, that is correct.

Q. Then, you put in formal form by reproducing that draft working copy, the order as adopted by the Commission?

A. Yes.

Q. And then that reproduced copy taken from your master working draft goes into the formal files of the Commission where it remains available for the public?

A. Yes.

Q. And that is the order of the Commission?

A. Yes.

Mr. Moody: We object to the last three questions because they are leading, and the last one because it calls for a legal opinion and conclusion of the witness.

By Mr. Turner:

Q. The master working draft of the order—is that any official record as far as being kept on file?

Mr. Moody: We object to that because it calls for a conclusion and opinion of the witness.

The Witness: The official copy of the Commission's action is in the Commission's minutes which we maintain in a minute book.

Mr. Moody: We object to that answer because the witness expressed a legal conclusion as to what is the official action.

By Mr. Turner:

Q. These drafts or official copies of proposed orders that members of the Commission and yourself have when the Commission orders action in a given matter—are the members of the Commission and yourself free to dispose of that if you see fit—at least you—after you have made up a formal order of the action of the Commission based on your master [fol. 340] copy?

A. I wouldn't feel it was necessary to preserve those any longer than it takes me to put them in another form, another shape. If the drafts were drawn in nice typewritten form

and a nice grade of paper and there were no changes made it might be possible to use those for the final minutes without being duplicated.

Q. Are some of the changes made out by you in longhand on your master draft copy?

A. Yes.

Q. And are there interlineations here and deletions there in pen or pencil?

A: There are often such, yes, sir.

Q. Then, after it is typed up or reproduced word for word in a formal copy, is there any occasion for retaining the marked-up draft or master copy?

A. I wouldn't regard it as absolutely necessary to do so.

Q. By reason of the changes that might be made on the master copy during the course of the deliberations by the Commission on the order or terms of the order by virtue of those changes by interlineation and deletions and additions, would that if that were displayed indicate the mental processes of the Commission and the policy of the members of the Commission in arriving at their order?

Mr. Black: We object to that as calling for his opinion.

Mr. Moody: And a conclusion. The instrument itself would be the best evidence. May I ask a question here——

Mr. Turner: If it is for the purpose of an objection.

Mr. Moody: For the purpose of an objection.

Is the master copy to which you referred still in existence?

The Witness: I have checked the records and find that it is still in existence in this particular docket.

Mr. Moody: Then we object to any further reference in any of the questions to that copy or comparisons between that and other copies or similarity and likeness between that and other copies of the instrument, because the instrument itself would be the best evidence.

Mr. Turner: I don't like to object so much and interrupt you, but may it be understood that objection goes to further questions you ask along the same line?

[fol. 341] Mr. Turner: That is any objection you have based on the fact that the master draft copy that the witness has referred to is not produced—you have stated that enough.

Mr. Black: And the objection is that it calls on him to compare the drafts you have here with the master draft and the master draft has not been produced.

(At this point, a short recess was had; after which, the taking of the deposition was resumed as follows:)

By Mr. Turner:

Q. Mr. Fuquay, referring to this master draft copy, your working paper by which you set down the terms of the order of November 30th as prescribed by the Commission, do you have any objection to producing that working copy?

A. I have consulted the General Counsel as to whether I should disclose my contemporaneous notes of the order adopted by the Commission on November 30, 946 in the Matter of Michigan-Wisconsin Pipe Line Company, Docket No. G-669.

Those notes contain a draft of the order identical in its provisions to the official order which the record indicates was served by me on the parties on December 2, 1946, and shows its adoption on November 30, 1946.

However, my notes are in the form of a typewritten draft which contains pencil changes, deletions and interlineations, all of which were made by me during the Commission's consideration and prior to its adoption of the order on November 30th, 1946, and such changes, deletions and interlineations may to some extent reveal the mental processes of the commissioners in reaching their decision and, may to some extent indicate the Commission's deliberations.

These notes are therefor confidential and the General Counsel advises me that I am not authorized to make them public.

Mr. Moody: May we have that paper from which you are reading, or a copy of it?

(Paper handed by witness to Mr. Moody.)

Mr. Black: We object to that on the ground that the statement itself shows or purports to claim that the so-called master draft bearing the penciled interlineations re-
[fol. 342] ferred to, is an identical copy of the one that was finally published, and, therefore, it does not show the mental processes or any confidential matters any more than the final copy.

Mr. Moody: Furthermore the statement that the so-called master draft is identical in its provisions to the official order which the record indicates was served, ex-

presses a conclusion of the witness and shows that the so-called order that was served is secondary evidence and refusal to produce it is denial to the parties of access to original evidence.

Mr. Jones: And we would like to object on the additional ground that the statement does not state that the disclosure of the so-called master draft will disclose the mental processes by which the Commission arrived at its decision and that the previous testimony of this witness may tend to show that it is an official record rather than a confidential record.

By Mr. Turner:

Q. So that there may be no question so far as the last objection is concerned, Mr. Fuquay, is it by reason of the changes, the deletions and the interlineations which would show on that master draft copy, that you consider it would be a reflection of the internal functioning of the Commission and the mental processes by which the final form of order was arrived at?

A. If there were no changes whatever, no initials on the draft or anything of that kind, I would not regard it as confidential. In fact, I think on some occasions in an emergency we have actually made available to the parties late in the afternoon a draft of the copy and I have actually certified at the bottom.

Mr. Black: I didn't get the last of that. Will the reporter read it back?

(Thereupon, the reporter read as follows:

"In fact, I think on some occasions in an emergency we have actually made available to the parties late in the afternoon a draft of the copy and I have actually certified at the bottom.")

Mr. Moody: In the last part of your answer you are [fol. 343] not referring to this particular instance in G-669, but to some other cases?

The Witness: That is correct.

Mr. Moody: To that extent that part of the answer is not responsive and it is objected to.

By Mr. Turner:

Q. But on this particular draft copy of November 30, 1946 are there changes, deletions and interlineations and additions shown on the draft copy?

A. Yes, there are.

Q. Is it by virtue of those that you feel it reflects the mental processes by which the Commission arrived at its order?

Mr. Jones: We object to that on the ground it assumes a fact not in evidence.

By Mr. Turner:

Q. And you feel for that reason it is confidential and you are not at liberty to produce it upon advice of the General Counsel of the Federal Power Commission?

A. Yes.

Mr. Turner: We desire to state into the record at this time that so far as the plaintiff in this case is concerned we have no objection to the production of the draft copy and would invite its production here during the taking of these depositions except that it is not the desire of the plaintiff in this case to require or ask for any material that may be confidential or not properly produced under the rules pertaining to confidential matters of the Commission, or a reflection of the mental processes of the members of the Commission.

Mr. Black: May I say something off the record?

(Discussion off the record.)

Mr. Turner: I wish to state in the record that I have not seen the draft that has been referred to. I have inquired as to whether there was such a draft presently in existence and I was told that there was but that it is confidential for the reasons which the witness has outlined and that therefore it is not available to me or to anyone else outside the Commission for inspection.

[fol. 344] Mr. Moody: This document that we are talking about the so-called master draft, is the same the Commission had before it on November 30, 1946?

The Witness: Yes.

Mr. Moody: And at the time the Commission voted?

The Witness: That is correct.

By Mr. Turner:

Q. Now, then, Mr. Fuquay, referring back to the practice and custom of the Commission in so far as the preparation of the minutes are concerned, is it the practice for you to draw up the minutes of the meeting of the Commission as distinguished from the terms of the orders adopted by the Commission?

A. Yes.

Q. The language of the minutes of the meeting as distinguished from the terms of the orders adopted by the Commission, is composed by you in the first instance?

A. Yes.

Q. You write that up using your own terminology?

A. Yes.

Q. But the orders are written up using the terminology as prescribed by the Commission?

A. Yes.

Q. Did you then, Mr. Fuquay, write up the minutes of the meeting of November 30, 1946?

A. Yes.

Q. I refer here, Mr. Fuquay, to Exhibit No. 6. Attached to your certificate is the first page of a photostat entitled "Minutes of the Two Thousand One Hundred and Nineteenth Meeting." That language shown on that one page—who composed that language, who wrote that language up?

A. I composed that language.

Q. Now, the orders attached thereto—whose language was the language in the orders attached?

Mr. Moody: Are you talking about all three of them or just the first one?

Mr. Turner: All three of them.

The Witness: That is the language of the Commission.

Mr. Moody: Wait a minute. We want to object to that. It calls for a conclusion and opinion of the witness, and [fol. 345] according to his previous testimony it is not the best evidence.

Mr. Black: And on the added ground the minutes of the Commission constitute the best evidence if they are originally composed by the witness, if adopted by the Commission.

By Mr. Turner:

Q. As far as the release of an order adopted by the Commission is concerned, are you under the practice and cus-

tom of the Commission authorized to release the order immediately, regardless of the write-up or subsequent adoption of the minutes as distinguished from the order?

Mr. Jones: We object to that. It calls for a conclusion. The rules of the Commission would be the best evidence.

By Mr. Turner:

Q. The minutes you prepare of meetings of the Commission—are they submitted to the Commission for approval?

A. Yes.

Q. And when are they ordinarily submitted to the Commission for approval?

A. Ordinarily at the next regular meeting. However that has varied some because we have at times been behind in our work.

I have known of occasion, I think, when they were submitted probably two or three weeks later.

This happened, I believe, in 1939 when the Commission did not have a quorum for about a month so that the minutes of this last meeting were probably approved about a month after the meeting.

In the normal practice we submit the minutes if we can get them ready by the next meeting.

Q. And the next regular meeting of the Commission subsequent to November 30, 1946 was what date?

A. As I recall it was December 3. It came on a Tuesday.

Q. Now referring, Mr. Fuquay, to the minutes of December 3, 1946 as reflected by Exhibit 13, were the minutes of the meeting of November 30, 1946 approved by the Commission?

A. Yes.

[fol. 346] Q. As well as minutes of other meetings of the Commission prior to the date of December 3, 1946?

A. Yes. It recites November 26, 27, 29, 30 and December 2 as being the minutes approved on December 3rd.

Q. What is submitted to the Commission and approved? Is that your write-up of the minutes of the meetings such as that reflected by Page 1 of Exhibit No. 6?

A. Yes.

Mr. Moody: Will you read that, please?

(The last question and answer were thereupon read by the reporter.)

By Mr. Turner:

Q. The orders as previously prescribed and adopted by the Commission—are they again gone into at such a meeting as this held on December 3rd?

A. No.

Q. Now, referring back, Mr. Fuquay, to the telegram of November 30, 1946 reflected by Exhibit 7, does that show entered on the docket sheets in Proceeding G-669?

A. I notice an entry here opposite the date of November 30, 1946 as follows:

"Telegraphic notice of findings and orders of 11/30/47" —that should be "46" I am sure—"sent to the following: Michigan-Wisconsin Pipe Line Company, Panhandle Eastern Pipe Line Company, Michigan Gas Storage Company and other parties appearing on the list attached to said notice."

Q. In the last several weeks was there an inquiry relative to that telegram of November 30, 1946?

A. As I recall some gentleman—I believe Mr. Stull—came in some weeks ago—I think prior to Christmas—and said he understood that a telegram went out notifying the parties of the adoption of this order but he didn't locate it in the files and, I made inquiry and found the telegram was in a folder different from the one that he had been examining and I asked the girl to put a copy in the docket folder in addition to the correspondence folder it was in.

Q. Being placed in the docket folder it would be properly shown, or should be shown, on the docket sheets. Is that correct?

A. Yes, because the docket sheets are used as a kind of reference or index to the docket files and entries are made as of the date of an action, or date of a filing or date [fol. 347] of transmittal of a letter so in running down the docket sheet if you expect something to be done about a certain date you can find it easily.

This entry was made as of November 30, 1946 because it referred to the date on which the telegram was supposed to have been sent.

Q. So that as a result of your instruction to an assistant in the Docket Section the telegram then should have been shown on the docket sheet?

A. Yes, because the docket sheet is at least attempted to be an index of the docket file.

Q. And you attempt to show the various items in their chronological order?

A. Yes, because the files are maintained in that order.

Q. So there would have been nothing improper so far as your practice or the purpose of these docket sheets are concerned, in your docket assistant showing that telegram then at the proper place that it should have been shown in its chronological order?

A. No, because——

Mr. Black: That is objected to as calling for an opinion and it is argumentative.

The Witness: No, because to show it anywhere else would not be very helpful. You would go through several pages and finally find it a year or so later which wouldn't help anyone to find anything.

I might call your attention to the fact that those sheets are used for the convenience of the staff and the public. As I stated before, we had no docket sheets for 16 years and we have now probably hundreds of inactive cases on which there never were any docket sheets made at all. We hope eventually to get some made up for them.

By Mr. Turner:

Q. As the docket sheets identified as Exhibit 1 show on their face, there have been several corrections in order to show the chronological history and proper order of this proceeding. Is that correct?

A. Yes.

Q. Now, Mr. Fuquay, you are the official custodian of the official records of the Commission?

A. Yes.

Q. This draft copy that has been referred to of the order [fol. 348] of November 30, 1946—is that or is that not an official record of the Commission?

Mr. Moody: We object to that as calling for an opinion and conclusion of the witness and the facts being stated concerning it, the law will determine its status, whether an official or unofficial document.

The Witness: I will ask you to read that question, please.

(The question was read by the reporter.)

The Witness: I do not regard it as among the permanent official records of the Commission because, as I testified

before, I would see no absolute necessity for retaining all those things after they have been put in proper form or better shape.

By Mr. Turner:

Q. You mean from the mechanical processes——

A. Yes.

Q. The formal write-up of them as distinguished from the terminology?

A. Yes.

Q. Do you consider that draft copy a working paper?

Mr. Moody: That question is immaterial and irrelevant.

Mr. Black: He is using terminology that the witness never has used.

The Witness: Some of them have a great many interlineations on them. What you may regard them as, I don't know.

By Mr. Turner:

Q. Do you have, Mr. Fuquay, a letter written to the Federal Power Commission by Charles V. Shannon dated December 13, 1946, together with the attachments to that letter?

A. I have here a copy of a letter dated December 13, 1946 signed by Charles V. Shannon under letterhead of Wheat, May, Shannon and St. Clair, together with attachments.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 14.)

By Mr. Turner:

Q. That copy is certified to by you?

A. Yes.

[fol. 349] Q. Is the letter together with the attachments that you have just referred to what has been marked by the notary as Exhibit 14?

A. Yes.

Q. And that is on file in the records of the Commission?

A. Yes.

Mr. Moody: May we see it a minute, please?

(Document handed by witness to Mr. Moody.)

By Mr. Turner:

Q. Now, is one of the attachments entitled "Application for a Certificate of Public Convenience and Necessity" in the Matter of Austin Field Pipe Line Company?

A. Yes.

Q. And was that application docketed and given a docket number?

A. Yes.

Q. And what docket number was it given?

A. G-834.

Q. Now, referring to the upper right-hand corner, the stamp "Federal Power Commission December 13, 1946 received," what does that indicate or reflect?

A. It indicates it was received in the Commission's mail room on December 13, 1946.

Q. And that in turn indicates it was filed on that date?

A. Yes.

Q. Below that, Mr. Fuquay, is another stamp "Federal Power Commission Docketed December 13, 1946, Docket Section, Secretary's Office." What does that indicate?

A. It indicates that it was docketed as of December 13, 1946.

Q. Is that in accord with the practice which you have previously explained concerning the dates of docketing in the respect that this being an instrument coming from someone without the Commission in to the Commission it is docketed in accordance with the date received by the Commission?

A. Yes, docketed as of that date.

Q. And in turn the date of filing with the Commission?

A. That is right, yes.

Q. Then, also attached to the letter mentioned, Mr. Fuquay, does there appear what starts out with the word "Lease"?

A. Yes.

Q. And does that have a docket number?

A. Yes.

Q. And in what proceeding was that docketed?

[fol. 350] A. The docket number stamped in the upper right-hand corner is G-669.

Mr. Black: We want to object to this. Every question calls for what is shown by the instruments. It is not only inadmissible as secondary evidence but a sheer waste of

time. The witness has certified it under the rules and his oral testimony does not add a thing to it.

By Mr. Turner:

Q. And it is the stamp of the Federal Power Commission "Docketed December 13 1946"?

A. Yes.

Q. That then shows what?

A. It shows it was docketed as of that date.

Q. Also attached to this Exhibit No. 14 is there what is entitled "Certificate of Service"?

A. Yes.

Q. Do you have a certified copy of the order of the Commission of December 14, 1946 in G-669?

A. Yes.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 15.)

By Mr. Turner:

Q. I hand you what has been marked by the notary as Exhibit 15 and ask you to state if that is the order last mentioned?

A. It is a certification of the Order Modifying Order Issuing Certificate of Public Convenience and necessity in the Matter of Michigan-Wisconsin Pipe Line Company, Docket No. G-669, dated December 14, 1946.

What I mean by "dated" is the date of adoption.

Q. Do you have a certified copy of the docket sheets in Proceeding G-834?

A. Yes.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 16.)

By Mr. Turner:

Q. I hand you what has been marked by the notary as Exhibit 16 and ask you if that is a certified copy of the docket sheets last mentioned?

A. Yes, true copies of the docket sheets in the Matter of Austin Field Pipe Line Company, Docket G-834.

Q. Do you have a certified copy of a letter to the Federal Power Commission from Charles V. Shannon dated December 26, 1946 together with the attachment thereto?

[fol. 351] A. Yes, I have certified this as a letter from Wheat, May, Shannon and St. Clair as the letter is written on the letterhead of Wheat, May, Shannon and St. Clair and signed by Charles V. Shannon.

Mr. Moody: What is the date?

The Witness: December 26, 1946.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 17.)

By Mr. Turner:

Q. Attached to this letter is there what is entitled "Application for Certificate of Public Convenience and Necessity" in the Matter of Michigan Consolidated Gas Company?

A. Yes.

Q. And when was that received and filed?

A. The stamp indicates that it was received by the Federal Power Commission on December 26, 1946.

Q. Was it given a docket entry number?

A. Yes, the docket number is G-839.

Q. Do you have a certified copy of the docket sheets in Proceeding G-839?

A. Yes.

(The documents referred to were thereupon marked by the reporter for identification as Exhibit 18.)

By Mr. Turner:

Q. I hand you what has been marked by the notary as Exhibit No. 18 and ask you to state whether or not that is a certified copy of the docket sheets last mentioned?

A. Yes, it is.

Q. Do you have a certified copy of the order of the Commission of December 30, 1946 in Docket G-669?

A. Yes.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 19.)

By Mr. Turner:

Q. I hand you what has been marked as Exhibit 19 and ask you if that is a certified copy of the order last mentioned.

A. Yes.

Mr. Moody: Let me see it, please, sir.

(Exhibit 19 for identification handed by the witness to Mr. Moody.)

[fol. 352] By Mr. Turner:

Q. Do you have a certified copy of the order of the Commission of January 3, 1947 in Docket 669?

A. Yes.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 20.)

By Mr. Turner:

Q. I hand you what has been marked by the notary as Exhibit No. 20 and ask you to state if that is a certified copy of the order just mentioned?

Mr. Black: We want to object again that Mr. Fuquay's certificate attached to every one of these papers complies strictly with the rules of Congress and the applicable rules of Court. This goes to the action of a public officer identifying his own certificate.

By Mr. Turner:

Q. Do you have a certified copy of a letter to the Federal Power Commission from Michigan-Wisconsin Pipe Line Company dated January 13, 1947 in Proceeding G-669?

A. Yes.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 21.)

By Mr. Turner:

Q. Do you have a certified copy of the opinion No. 147 issued February 7, 1947 in Docket G-669, including two dissenting opinions?

A. I have here true copies of Opinion No. 147 entered January 17, 1947 and Commissioner Draper's dissenting opinion dated February 3, 1947 and Commissioner Olds' dissenting opinion dated February 7, 1947 in the Matter of Michigan-Wisconsin Pipe Line Company, Docket G-669.

Mr. Moody: What date did he use in his question?

(The last question was thereupon read by the reporter.)

Mr. Turner: The question which I asked Mr. Fuquay was not properly phrased.

By Mr. Turner:

Q. These certified copies are of Opinion No. 147 entered January 17, 1947?

A. Yes.

Q. And Commissioner Draper's dissenting opinion dated February 3, 1947 and Commissioner Olds' dissenting opinion dated February 7, 1947?

A. That is correct.

[fol. 353] (The document referred to was thereupon marked by the reporter for identification as Exhibit 22.)

By Mr. Turner:

Q. That is what has been marked by the notary as Exhibit 22, is it?

A. Yes.

Q. Do you have a certified copy of Opinion No. 147-A and Order Supplementing Order Issuing Certificate of Public Convenience and Necessity, entered by the Commission on February 20, 1947 in G-669?

A. Yes.

Mr. Jones: Entered on what date?

The Witness: By the Commission on February 20, 1947.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 23.)

By Mr. Turner:

Q. Is that what has been identified by the notary as Exhibit No. 23?

A. Yes.

Q. Do you have a certified copy of the supplemental dissenting opinion of Commissioner Olds in G-669, dated March 20, 1947?

A. I have here a true copy of the dissenting opinion of Commissioner Olds dated March 20, 1947 in the Matter of Michigan-Wisconsin Pipe Line Company, Docket G-669.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 24.)

By Mr. Turner:

Q. That is what has been identified as Exhibit 24, is it?

A. Yes.

Q. Do you have a certified copy of Order Consolidating Proceedings and Fixing Date of Hearing, Entered by the Commission on March 20, 1947 in the Matters of Austin Field Pipe Line Company Docket G-834 and Michigan Consolidated Gas Company Docket G-839?

A. Yes.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 25.)

By Mr. Turner:

Q. Is that what has been identified by the notary as Exhibit 25?

A. Yes.

Q. Do you have a certified copy of the order modifying Opinion No. 147 and order in relation thereto of November 30 and supplemental order in connection therewith of December 30, 1946, entered by the Commission on May 6, 1947 [fol. 354] in the Matter of Michigan-Wisconsin Pipe Line Company, Docket G-669?

A. Yes, sir.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 26.)

By Mr. Turner:

Q. Is that what has been identified by the notary as Exhibit 26?

A. Yes.

Q. Do you have a certified copy of an order consolidating proceedings and fixing date of the hearing entered by the Commission on August 1, 1947 in the Matters of Austin Field Pipe Line Company, Docket No. G-834 and Michigan Consolidated Gas Company Dockets G-839 and G-918?

A. Yes.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 27.)

By Mr. Turner:

Q. Is that what has been identified by the notary as Exhibit 27?

A. Yes.

Q. Do you have a certified copy of the docket sheets in the Matter of Michigan Consolidated Gas Company, Docket No. G-918?

A. Yes.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 28.)

By Mr. Turner:

Q. Is what has been marked as Exhibit 28 a certified copy of those docket sheets?

A. Yes.

Q. Do you have a certified copy of the Findings and Order Issuing Certificates of Public Convenience and Necessity entered by the Commission on November 13, 1947 in the Matters of Austin Field Pipe Line Company, Docket No. G-834 and Michigan Consolidated Gas Company Docket Nos. G-839 and G-918?

A. Yes.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 29.)

By Mr. Turner:

Q. Is that what has been identified by the notary as Exhibit 29?

A. Yes, sir.

Q. Do you have a certified copy of a letter dated December 15, 1947 from Michigan-Wisconsin Pipe Line Company to the Federal Power Commission in the Matter of Michigan-Wisconsin Pipe Line Company, Docket No. G-669?

A. Yes.

[fol. 355] (The document referred to was thereupon marked by the reporter for identification as Exhibit 30.)

By Mr. Turner:

Q. Is that what has been marked by the notary as Exhibit 30?

A. Yes, sir.

Mr. Turner: We ask at this time that Exhibits Nos. 1 to 30 inclusive be attached to this deposition and made a part of the deposition so that each of these exhibits may be offered in evidence in the case under consideration as first

captioned; in other words, in the case of Phillips Petroleum Company vs. Skelly Oil Company et al., No. 2149 Civil in the District Court of the United States for the Northern District of Oklahoma.

Mr. Moody: You mean so that they may be offered at the trial of the case?

Mr. Turner: Yes, for use as evidence.

You may cross-examine.

(Discussion off the record.)

(Whereupon, at 1:00 p. m., the taking of the deposition of the witness Fuquay was adjourned until 2:30 p. m. of this day, Monday, January 26, 1948.)

Afternoon Session

(The taking of the deposition of the witness Leon M. Fuquay was resumed at 2:30 p. m., pursuant to the adjournment.)

Cross-examination.

By Mr. Moody:

Q. Mr. Fuquay, I will ask you to examine Exhibit 5 which you have identified and state if you can, please, sir, whether that is a photostatic copy of the vault copy or of the file copy?

A. This appears to be a photostat of the vault copy.

Q. Now, will you state, please, sir, what the vault copy is and what the file copy is?

A. They are both true and correct copies.

Q. I have reference in my question as to why the two are kept and to where they are respectively kept?

A. Why we keep two copies?

[fol. 356] Q. I understand that you keep what is called a vault copy of certain documents of the Commission and also keep what you call a file copy. Is that right or wrong?

A. Yes, and we keep additional copies around when they are needed for the convenience of the staff.

Q. I ask you if it is right or wrong and you say "Yes." Which is it?

A. We do. We keep a copy in the file and we keep a signed and sealed copy in the vault, which is what we call the minute book of the Commission.

Q. What is the purpose of keeping one copy called the vault copy and one copy called the file copy?

A. I think it is to be safe and to be sure that we have an accurate record. It is certainly more convenient.

Q. Did you state from your examination of Exhibit 5 that you thought it was a photostatic copy of the vault copy?

A. I think it is because it has page numbers on it.

Q. Now, to the vault copy would anything ordinarily be attached?

A. I don't know what you mean by that question. To the vault copy of this order would something be attached?

Q. Yes, or would it be attached to something else ordinarily?

A. I don't think I get the significance of the question.

Q. I have in mind whether or not the vault copy is attached to the minutes records of the Commission.

A. The entire minutes of the Commission, including orders of the Commission, are found in what we call the minute book, bound and the pages are numbered. They are attached or bound together, the whole record is bound together in the minute book.

Q. Will the vault copy that you speak of *of* this instrument dated November 30, 1946 which is identified as Exhibit 5 to be found in that minute book?

A. Yes, that is right.

Q. All right, sir. While we are waiting on that I will ask you some other questions.

The telegram or the copy of what you state is a telegram, identified as Exhibit 7, I understand you to say indicated that it was dictated on November 30, 1946.

Do you have the exhibit in your hand now?

A. Yes, I do.

[fol. 357] Q. Except for the date in the upper right-hand corner do you have any independent recollection of when it was dictated?

A. I would have to base that on recollection. That is what you asked for.

The record of course, indicates it was dictated on the 30th but it is also my recollection that this meeting was held on a Saturday.

This is a highly important case and it turned out to be a controversial case. The Commission does not ordinarily meet on Saturday although it sometimes does. It is not a Government working day, a regular working day.

My recollection is that the Commission did meet on a Saturday, the action was taken that day as the record shows, and that as soon after the action was taken as possible I dictated this telegram and instructed the stenographer personally to go down and deliver it to the telegraph office and make sure it was so delivered. That is based on my recollection of what happened that Saturday.

Q. My question is: Aside from what appears on Exhibit 7 do you have any independent recollection of when you dictated that telegram?

A. I think I just gave that information based on my recollection of this case.

Q. Aside from what appears on Exhibit 7 do you have any independent recollection of when you dictated that telegram?

Mr. Turner: We object to this as being argumentative for the reason that the witness has twice stated that it is his independent recollection that he sent the telegram on that date.

The Witness: I think I would almost have to repeat my answer a while ago:

By Mr. Moody:

Q. You do or do not have an independent recollection?

A. If I didn't have the record here before me it would be rather difficult for me to recollect that on November 30, 1946 I sent a telegram. I would not have any occasion to remember a date like that but my record shows that the Commission sent this telegram on November 30, 1946 and by thinking over the matter and trying to brush up on my recollection [fol. 358] which you asked me to testify to, it becomes clear in my recollection that the meeting was on a Saturday, the telegram was dictated immediately after the Commission formally adopted the order, and I was very careful to see that the girl took it to the telegraph office herself.

That is my recollection about it.

Q. That is independent of the instrument itself?

A. I don't know how I could have a recollection of a particular date that far back unless I had some record to go on. How could I remember this long that on a particular day I had this recollection.

But the record showing the Commission took this action on that day, I have a recollection of the telegram being dic-

tated based upon the order I had before me, and taking extreme care to see that the telegram was delivered to the Western Union Office.

Q. Then, do you mean to say that your recollection is predicated upon the record that you have before you, Exhibit 7?

A. I don't think I could guess the date back there unless my records showed that that was the day that all this important stuff was going on.

Q. Do you personally know on what date the instrument of which Exhibit 7 is a copy was filed with the telegraph office, if it was ever filed with the telegraph office?

A. I do not know of my personal knowledge that it was ever filed with the telegraph office.

Q. You have there now the file copy and the vault copy of the instrument which has been identified as Exhibit 5?

A. Yes, I have the file copy before me.

Q. Is the instrument which you now show to me the file copy?

A. That is correct.

Q. It bears your signature and the seal of the—Is this your signature?

A. Yes.

Q. Is the imprint on the lower left-hand corner of page 6 the print of the seal of the Federal Power Commission?

A. Yes, it is.

Q. What about this copy with respect to whether it is a mimeographed copy or an original print of the typewriter?

A. It looks to be a mimeographed copy.

[fol. 359] Q. Do you have the vault copy there now?

A. Yes, I do.

Q. Is the instrument which you exhibit to me the vault copy of the instrument which has been identified in the record as Exhibit 5?

A. This is the vault copy of the order which was adopted by the Commission on November 30, 1946 in Docket G-669, Michigan-Wisconsin Pipe Line Company (indicating).

Q. Is it the vault copy of which Exhibit 5 is a certified copy?

A. Yes, I think I testified a few moments ago that in my opinion this certification was made from the vault copy.

Q. Is the vault copy a mimeographed copy or made from a mimeographed stencil, or is it the original imprint of the typewriter?

A. That I do not know.

Q. Can't you examine it and tell?

A. It would appear to be made by some duplicating process and not to be an original typed copy.

Q. Does this vault copy of what has been identified in the record as Exhibit 5, bear your signature?

A. Yes, it does.

Q. Is this your signature at the bottom of page 6?

A. Yes, it is.

Q. Is this imprint at the lower left-hand corner of page 6 the seal of the Federal Power Commission?

A. Yes, it is.

Q. Mr. Fuquay, examine the paragraph numbered (3) at the top of page 6 of the file copy and also examine the same paragraph at the top of page 6 of what you have identified as the vault copy, and describe to the reporter please the difference in the two paragraphs.

A. The language is exactly the same.

Q. Has anything been marked out in paragraph (3) of the file copy?

A. Yes, there has been a typographical error made in that copy. The word "contractual"—apparently that was struck out in ink.

Q. Read the paragraph at the top of page 6 marked (3) to the reporter as it would have read had the word "contractual" not been struck out.

A. It appears to be "contractual."

"(3) Panhandle's contractual rights and obligations at [fol. 360] the date of termination of the existing contract, on December 31, 1951."

Q. All right. Now then, the corresponding paragraph of the vault copy—does it or not contain the word "contractual"?

A. No, it does not and may I ask you to check there and see whether or not you asked me in reading this to read it as it would have read before the word "contractual" was stricken?

Q. Yes.

A. The answer to the last question is that the paragraph (3) at the top of page 6 of the vault copy does not contain the word "contractual."

Q. Did it ever contain the word "contractual"?

A. The vault copy?

Q. Yes.

A. No.

Q. The vault copy to which you refer is attached to the minutes of November 30, 1946, is it not?

A. It is in the same minute book. It is bound with the minutes.

Q. Let me ask you this question: Was the vault copy to which you have referred attached to the minutes of November 30, 1946 at the time the minutes were presented to the Commission for approval?

A. You mean this signed vault copy here?

Q. Yes, sir.

A. I don't know whether it was or not.

Q. Do you read in the minutes "Action was taken as set forth in the documents appended hereto in the following manner"?

A. That is right.

Q. That appears in the minutes?

A. That is right.

Q. Does that refresh your memory as to whether or not the instrument you have identified as the vault copy was attached to the minutes of the November 30, 1946 meeting at the time the minutes were presented to the Commission?

A. No, I do not know whether they were attached or not.

Q. All right. If that copy was not attached to the minutes was some other copy attached to the minutes as presented to the Commission?

A. That I do not know either. The record will have to speak for itself.

Q. Is the volume you have before you the minutes of the Federal Power Commission?

A. Yes, for the dates indicated on the volume.

Q. What is page 22,460 of this volume with respect to [fol. 361] whether or not it is minutes of the Commission?

A. I think those minutes speak for themselves very clearly.

Q. I am just asking you to identify it.

A. You asked me what they were with respect to the minutes.

Q. I asked what page 22,460 of this volume is with respect to whether or not it is the minutes of a meeting of the Commission on November 30, 1946.

A. It states it is the Minutes of the Two Thousand One Hundred and Nineteenth Meeting and proceeds to set out—on the rest of the page—the minutes.

Q. Well, will you attach to your answers and mark the same Exhibit 31, a photostatic copy of page 22,460 of this volume?

A. I will be glad to, sir.

(Exhibit number "31 for identification" reserved for a document to be furnished by the witness.)

By Mr. Moody:

Q. I will ask you what is the date of the next minutes that appear in this volume of minutes after page 22,460.

A. The next numbered meeting of the Commission, according to this, was held on December 2, 1946.

Q. And on what page does that appear?

A. That begins with page 22,476.

Q. Will you attach to your answers and mark as Exhibit 32, a certified copy of page 22,476 in this book of minutes?

A. I will be glad to, sir.

Q. Will you certify to each of these copies that I have asked you to attach and such other copies as I might hereafter ask you to attach?

A. Yes.

Q. Following page 22,476, what is the next page in this volume showing minutes of a meeting of the Federal Power Commission?

A. The next is the Two Thousand One Hundred and Twenty First Meeting which begins on page 22,480 and was held on December 3, 1946.

Q. All right. Will you attach to your answers and mark the same exhibit 33, certified photostatic copy of the minutes of that date?

A. Yes.

(Exhibit number "33 for identification" reserved for a document to be furnished by the witness.)

Mr. Moody:

Q. I hand you here Exhibit No. 6. Is that a correct copy [fol. 362] of the minutes of the meeting of November 30th as shown here in the minute book which we have before us?

A. Yes, it is.

Q. That then is a photostatic copy of what I asked you to attach a while ago and identify as Exhibit 31?

A. Yes.

Q. It will not be necessary then for you to attach it.

(Reservation of exhibit number "31 for identification" cancelled.)

By Mr. Moody:

Q. Do you have a photostatic copy of the minutes of December 2nd?

Mr. Turner: We have them here.

By Mr. Moody:

Q. I have asked you to attach a copy of the minutes of that meeting and mark it as Exhibit 32.

(The document referred to was thereupon marked by the reporter for identification as Exhibit 32.)

By Mr. Moody:

Q. Is the instrument which I hand to you and which the reporter has marked Exhibit 32, a certified copy of the minutes of the meeting of the Federal Power Commission held on December 2, 1946?

A. Yes, it is a certified copy of the first page, page 22,476.

Q. Are there any other pages to the minutes of that meeting as shown in the minute book here?

A. The minute book is paged serially so that the orders which follow are paged too.

This is a statement of the minutes which I prepared and submitted to the Commission for that meeting and which was approved by the Commission.

Q. In the minute book following page 22,476 of which Exhibit 32 is a copy, there are three pages, I believe, of what purports to be an order.

Is this order part of the minutes of the meeting of December 2, 1946?

A. That order was the Commission's action of December 2, 1946.

Q. Is it a part of the minutes?

A. It is contained in the minute book but it was not a part [fol. 363] of the statement which I submitted to the Commission for approval.

The statement of minutes was merely a recitation by me to the Commission of what they did on the preceding date. That statement itself taken alone may be regarded as the minutes of the meeting.

Mr. Turner: So the record will be straight, there is no Exhibit 31, is there?

Mr. Moody: No.

Mr. Turner: And this is identified as Exhibit 32 and your previous request to the witness to supply a certified copy of page 22,476 is withdrawn in view of the production of this Exhibit 32?

Mr. Moody: I will get to that.

Mr. Turner: Let's keep the numbers straight.

By Mr. Moody:

Q. Your Exhibit 32 I understood you to say is a copy of the first page of the minutes of a meeting of December 2, 1946.

Is it a complete copy of the minutes of the meeting of December 2, 1946 and all the minutes referred to?

A. The minutes refer to certain orders adopted by the Commission on that date and the orders immediately follow the minutes.

Q. That Exhibit 32 does not include the order which in the minute book immediately follows page 22,476 does it?

A. This exhibit here does not.

Q. All right. Now then, that having been supplied, you need not make another copy of Exhibit 32.

Now then, I hand you here the instrument which the reporter has identified as Exhibit 13. Does that cover and include all the minutes of the meeting of the Commission held on December 3, 1946?

A. This does not contain the orders which are referred to as having been adopted at a previous meeting and which follow the minutes in the minute book.

Q. All right, sir.

Now, Mr. Fuquay, the Commission actually approved the [fol. 364] minutes of the November 30th meeting on December 3, 1946, did it not, and isn't that the first time that it approved the minutes of the November 30th meeting?

A. These minutes will have to speak for themselves.

Q. All right, sir. Do you remember when the minutes of the meeting of November 30, 1946, as you prepared them,

were presented to the Commission for action, to approve or disapprove?

A. No, except from checking the record.

Q. All right. From examining the record can you refresh your memory and tell me what date the minutes of the meeting of November 30th were presented to the Commission?

A. The record states it. I don't have to refresh my memory. It states that this is a portion of the minutes of the Two Thousand One Hundred and Twenty First Meeting. The minutes of the Two Thousand One Hundred and Sixteenth, Two Thousand One Hundred and Seventeenth, Two Thousand One Hundred and Eighteenth, Two Thousand One Hundred and Nineteenth and Two Thousand One Hundred and Twentieth Meetings of November 26th, 27th, 29th, 30th and December 2nd respectively were read and approved.

Q. All right. Having read that part of the record do you now know that that was the first meeting at which the minutes of November 30th were presented to the Commission?

A. The record shows that the Commission held a meeting on December 2nd. That does not indicate that any minutes were presented on December 2nd for approval. I can only rely upon the record.

Q. On direct examination I understood you to say at sometimes you would get behind on writing up your minutes and there would be some time elapse before the time the minutes were written up and the time they were presented to the Commission for approval. Did I correctly understand you or not? Did you make such a statement?

A. Yes, it would be possible for the stenographers to get behind in preparing the minutes of preceding meetings and it might actually go through the next meeting and go over to the next one. That would be possible.

Q. From examining the minute book there, is your memory refreshed as to when the minutes of the November 30th [fol. 365] meeting were presented to the Commission for approval?

A. Not refreshed except as to what it states here. It states specifically that they were presented at the meeting of December 3rd and read and approved.

Q. Is your recollection that they were presented on that date?

A. I have no independent recollection. I can rely upon these minutes though.

Q. All right. At the time the minutes of November 30th were presented to the Commission for approval, did they have attached to them, or did you have there available copies of the instrument that has been identified here in the record as Exhibit 5 and that is referred to as appearing in that book as Exhibit 5?

A. I don't know. I will have to let the minutes speak for themselves on that.

Q. Now, then, Mr. Fuquay, which did you sign first, the file copy of what is identified in the record as Exhibit 5 or the vault copy of what is identified as Exhibit 5?

A. I would have no way in the world of knowing that.

Mr. Turner: Excuse me, but do you now want Exhibit 33 that you requested a while ago to be prepared, to be prepared by this witness.

Mr. Moody: 33 is the minutes of December 3rd so I will withdraw my request for Exhibit 33.

(Reservation of exhibit number "33 for identification" cancelled.)

By Mr. Moody:

Q. Mr. Fuquay, you don't know which you signed first, the file copy or the vault copy?

A. No, sir.

Q. Did you sign any copy other than those two copies that you recall?

A. Of those orders of November 30, 1946?

Q. Yes, the ones identified as Exhibit 5.

A. I have not checked the record but undoubtedly I signed a great number which were going out to the parties for service.

Q. What character of copies would they be with respect to whether they were typed or mimeographed?

A. I don't know unless I could see the copies that were sent out.

Q. What is your practice, to mimeograph them or type them?

A. We mimeograph them but sometimes if there are [fol. 366] not many parties we actually type them.

Q. Do you know how many copies were sent out of the instrument of which Exhibit 5 is a copy?

A. No, I do not.

Q. Could you approximate it at all?

A. No, I could not. There are a great many parties interested in that proceeding, I would think.

Q. Would it be as many as ten, fifteen, twenty or thirty?

A. I think we sent copies to more than that. How many signed ones were sent out, I don't know.

Q. I called out ten, fifteen, twenty or thirty?

A. It is purely a matter of recollection and I don't have the records before me to show who the interested persons were.

Q. Would the instrument identified as Exhibit 7, the telegram, refresh your memory as to the number that were sent out?

A. That shows to whom the telegram was to be sent. I think our docket records would indicate to whom the letter serving the order on December 2nd was sent. It is a matter of public record. I don't recall it.

Q. Do you remember when the mimeographed copies were made?

A. No, I do not.

Q. You know they were not made on November 30th, do you not?

A. I do not.

Q. You don't know whether they were or were not made on November 30th?

A. No, sir.

Q. What time did the Commission adjourn its meeting on November 30th?

A. I don't know that.

Q. Didn't you state earlier in your examination it was late in the evening?

A. I don't know if I did or not.

Q. Was it or not late in the evening?

A. It would be purely a matter of recollection.

Q. What is your recollection?

A. Judging by the telegram which went out that day which normally would go down through the mail room, and the fact that I directed the stenographer to take it over personally to the Western Union office, would indicate that there were no mail clerks down there at that time.

I don't remember if there were mail clerks in for that day or not. If there were they might have left at five

o'clock and it might be that for that reason I sent her down personally with it.

[fol. 367] Q. Haven't you heretofore stated that the Commission met and adjourned late in the afternoon on November 30th?

A. I don't believe I stated that. If I did——

Q. Have you ever stated that?

A. I don't recall ever having stated that. I don't know what time they adjourned because the minutes don't show when they adjourned.

Q. What kind of a force did you have here that day, a skeleton force or a full force?

A. Saturday was a non-Government working day so it certainly was not a full force for the Commission on that day.

Q. Have you heretofore stated in your examination that it was a skeleton force?

A. I don't think I have.

Q. If you have you don't remember it?

A. No.

Q. Do you know whether any copies of this order were available on November 30th for the general public or the interested parties?

A. I had the master copy which the Commission adopted on November 30, 1946.

Q. Do you know whether or not there were any copies available for the interested parties or the general public on November 30th and, when I say "order" I refer now to the instrument identified in the record as Exhibit 5?

A. I don't know as a matter of fact whether there were any such copies or not. I do know I had the master copy which could be examined by anybody that wished to examine it.

Q. Do you know whether or not you had a force here on November 30, 1946 at the time the Commission met and adjourned?

A. I don't know.

Q. Do you know that you did not?

A. No, I do not. The mimeograph employees are not under my direct supervision. I might have some office records of my own to indicate if they were.

Q. Where is the mimeographing done in this building?

A. I don't know what floor. Probably the third floor or some place.

Q. Did you on the evening of November 30, 1946, after the Commission adjourned, take any steps towards reducing the master copy of what you have referred to as the Commission order, to writing, so that it would appear and be available without any interlineations or additions or marked-out places that were in the master copy?

[fol. 368] A. I don't know whether I took any steps or not. I know the record shows it was served on the 2nd, which was the following Monday, so apparently I did not take sufficient steps on the 30th to get service completed.

Q. So from that fact don't you know, Mr. Fuquay, that the mimeographed copies were not prepared until December 2nd, 1946?

A. I don't know that is a fact, no.

Q. What is your best recollection about it?

A. I don't have any recollection about it particularly, except that the record shows we served the order on the 2nd of December and so apparently we could not do all the administrative acts necessary to reproduce and serve it on November 30th. At least, we didn't do it. I don't know if we could have or not. It was on a Saturday.

Q. Whether you should or should not, what I am trying to get at is what your memory is as to when the mimeographed copies were prepared, using whatever records may serve to refresh your memory on that point.

A. Conceivably it could have been started on November 30th and it conceivably could have been completed on November 30th, but I don't know. I do know the record shows we did not serve them on the parties until December 2nd.

After all, a good many things are going on in the Commission and I can't personally check the status of the work.

Q. Your office had charge of getting out the copies and getting out service?

A. Yes, and the record shows we did serve it on December 2nd. That is what I go by.

Q. Don't you remember that Mr. Don Cuiton was here in your office and endeavored to get copies on December 2nd and that mimeographed copies were not available until late in the afternoon of December 2nd, and also Mr. Stull who sits in this room was here attempting to get copies on December 2nd and they were not available until late in the afternoon of December 2nd?

A. My recollection is a good many parties were here on December 2nd attempting to get copies. Who they were, I don't know.

Q. You also remember that they were not available and they had to wait for them?

A. I don't know if they had to wait at all.

[fol. 369] Q. Mr. Fuquay, do you have any recollection on that point at all?

A. None at all.

Q. Have you any interest in this law suit that your deposition is being taken in, or do you desire to help or hinder any party thereto?

A. I will answer "No" to that and say in addition thereto that the question is not in very good taste.

Mr. Turner: We object to this line of questioning whereby counsel is arguing with the witness.

By Mr. Moody:

Q. Mr. Fuquay, you said a while ago that the master copy was available on the evening of November 30th and could have been examined at that time by the interested parties, did you not?

A. Yes, that would have been possible.

Q. Would it have been available to them if they had asked for it?

A. It could have been made available to them. Of course, by so doing it would have had the same interlineations and other matters to which I objected, but I possibly could have covered over some of the interlineations. I don't know——

Q. The question——

Mr. Turner: Let him finish the answer.

The Witness: I had there the Commission's complete action and all of its terms and conditions in my possession and it was available. As to exactly how I would have conveyed that to the interested persons who asked for it, that is another matter.

By Mr. Moody:

Q. My question is: Was that master copy available to be seen by the interested parties on the evening of November 30, 1946?

A. I would not have shown the master copy exactly as it was to the interested parties, but it would have been possible to convey to them the exact wording of the order.

I would have declined to show to them the interlineations and parts that were struck to show the mental processes of the commissioners.

Q. You say you don't know if there was any other copy available at that time or not?

A. No, I do not.

[fol. 370] Q. Did you have any other copy at that time other than the master copy?

A. At what time?

Q. Late in the evening of November 30, 1946?

A. At the time the Commission formally voted and took its action I had only one copy, the master copy.

Q. Do you have any recollection of having any other copies made in the evening of November 30, 1946?

A. There was a great deal going on that day and I don't recall what was done on November 30th.

Q. Do you recall having any other copies available in the late afternoon of November 30, 1946, other than the master copy that you speak of?

A. I do not recall.

Q. You mean you do not recall having other copies available?

A. That is what you asked me, and I do not recall.

Q. Now, Mr. Fuquay, it is a fact, is it not, that you never signed any copies of what appears here in the record as Exhibit 5, until the mimeographed copies were available?

A. I don't know whether that is a fact or not.

Q. All right. The only ones you now have available bearing your signature are mimeographed copies. Isn't that true?

A. I have a vault copy here that bears my signature. There is a copy here in the docket file which bears my signature.

There might be other copies around here which bear my signature. I could have signed dozens of them. I don't know.

Q. My question is: Do you have any other copies of what is identified in the record as Exhibit 5 available, other than mimeographed copies bearing your signature?

A. Do I have or did I have.

Q. Do you have. I am asking what you have now.

A. I have not made a search to determine whether this order has been reproduced in some other form or not. It may have been.

Q. What other form would it have been reproduced in?

A. There are lots of ways to reproduce orders.

Q. Tell me. I don't know what you mean?

A. Ditto is one that I can readily think of. It would have been possible to have typed the order and multilithed it from the typed copy.

[fol. 371] Q. You mean other means of making copies?

A. Yes. You asked if mimeographed copies are the only ones that had ever been made.

Q. Do you have more ways and do you use other means of making copies than mimeographing?

A. I think in our duplicating room they have a multilithing process. I wish I had brushed up on these technicalities for you before the deposition. I think they have that method down there too.

Q. Do you know of any other copies, whether they are mimeographed or multigraphed or dittoed or multilithed—do you know of any copies by whatever means they may have been made, that are now available and bearing your signature, except those in that minute book?

A. I don't know. There may be some. I have no way in the world to know that.

Q. You have no way in the world to know that?

A. No. There may have been additional runs of this order made by additional processes because of public interest in the proceeding. That would be a routine matter that would come through the duplicating division down there. I wouldn't know.

Q. Do you have any recollection of having seen any such copies?

A. No, I don't have any recollection about it.

Q. Then, for the purpose of refreshing your memory, I will ask you if it is not true that the first one of these—the copy of what you signed, of what is identified in the record as Exhibit 5, was a multigraphed or mimeographed copy furnished to you on December 2, 1946?

A. Will you read the question, please?

(The question was read by the reporters.)

The Witness: I don't know.

By Mr. Moody:

Q. You don't know?

A. No.

Q. Do you claim that any copy was signed by you prior to December 2, 1946?

A. No, I don't claim that.

Q. And you have no recollection of signing any prior to December 2, 1946, have you?

A. No, I do not.

Q. So, as far as your memory goes, you do not remember having signed any prior to December 2, 1946, and as far as your memory goes you don't remember having signed any [fol. 372] except either a multigraphed or mimeographed copy. Is that correct?

A. I don't remember whether I did or did not.

Q. Now, then, so far as your memory goes, you don't remember having put the seal of the Federal Power Commission on any copy of this instrument identified as Exhibit 5 in the record prior to December 2, 1946?

A. I do not have any recollection.

Q. And you have no record of having sealed any prior to that date, have you?

A. No, I do not.

Q. All right. So far as your records go, they only serve to indicate that on December 2, 1946 you signed copies of this order and attached the seal to them. Is that right?

Mr. Turner: We object to that as argumentative, repetitious and assuming something the witness has heretofore stated is not the case.

The Witness: My records don't indicate whether I signed it on December 2, 1946 or not.

By Mr. Moody:

Q. O. K. Now, Mr. Fuquay, the last paragraph of the instrument there that is identified as Exhibit 5—will you explain that, please? That is designated as paragraph c.

A. To which volume do you have reference?

Q. Either one of them. Will you strike that, please and I will ask you to look at the exhibit identified as Exhibit 5 and look at the last paragraph.

A. All right, I have it before me.

Q. Who wrote that last paragraph, please, sir?

A. This paragraph contains the words of the Commission itself.

Q. My question was, Mr. Fuquay: Who wrote that paragraph, please, sir?

A. What do you mean by "write"?

Q. Who wrote it out the first time it was written out.

A. I do not know.

Q. Didn't you write it, Mr. Fuquay, and haven't you stated that you wrote it?

A. I don't know whether I stated that I wrote it or not.

[fol. 373] Q. Sir?

A. I don't know whether I stated that I wrote it or not.

Q. You don't know whether you stated that you wrote it or not?

A. I don't know who wrote it. It is the words of the Commission. I would have been possible and it would have been——

Q. Isn't it true——

Mr. Turner: Let him finish.

The Witness: Would have been quite possible for the Commission to have dictated that in the course of the meeting and I may have written it in longhand on the master draft which I had before me but I did not compose it.

By Mr. Moody:

Q. Mr. Fuquay, do you recall having stated that that matter was purely a ministerial matter and that you wrote that?

Mr. Turner: We object to that as assuming something and stating that the witness has said something which he has not said.

The Witness: I did not say any such thing as that, I am sure. I have stated that every word contained in the order is the action and words of the Federal Power Commission and I had nothing to do with composing any part of the order.

By Mr. Moody:

Q. When I ask you that question, Mr. Fuquay, I hope you understand that I am not asking you whether or not you remember having made such a statement as that on the occa-

sion of the taking of your deposition. I mean at a prior time, to-wit on January 6, 1948.

A. I am sure I did not make that kind of a statement on any day. That would have been adding something to the Commission's actions which I have no authority to do and which I would not dream of doing.

Q. I am mistaken about the date. It was approximately December 6, 1947.

A. Well, I did not make any such statement or anything similar to it.

Q. All right.

A. I can, however, if you wish me to clarify approximately what I think I said to you about that date about which you must be very confused.

[fol. 374] Q. No, I am not confused, Mr. Fuquay.

A. My statement had reference to the question of whether or not there should be "date of issuance" written at the lower lefthand corner of the order.

Q. No, I am not mistaken. And you can't help us at all in telling us on what date and at what hour of the day these orders or copies of this instrument which has been identified as Exhibit 5 were available for the interested parties and the public?

A. I can help you by stating that the master draft which I had was available on November 30th. As to when duplicated copies were available I do not know except what the record shows, namely, that it was served on December 2nd.

Q. But I thought you said you would not have exhibited that master copy. I am talking about copies they could get and carry away with them.

A. I would not have handed my master copy to a person and let him remove it and go away with it.

Q. What I am getting at is this: Can you give us any help on when copies of this Exhibit 5 were available to the interested parties and the general public, and when I say "copies that are available" I mean copies they could have received and carried away with them?

A. I do not know the earliest time they would have been available, no.

Q. Well, you know it was not prior to December 2nd?

A. I would not say that as a matter of fact, no, sir.

Q. I understood you to say a while ago, or I got the impression from your testimony, that they were not available until December 2nd.

A. The record shows they were served on December 2nd. The reproduction machinery is on another floor, out from my direct supervision.

Whether they were available earlier than that I couldn't say, but it indicates they were not available for distribution prior to that.

Q. Were you here on December 1st?

A. December 1st would be a Sunday, would it not?

Q. Yes.

A. I don't recall if I was here Sunday or not. I have worked some Sundays. I don't work very many, I am glad to say.

[fol. 375] Q. Now, Mr. Fuquay, if you will examine the minutes there in your vault copy and the copies of orders attached there to the minutes of November 30th—there are three instruments attached I believe to the minutes of November 30th. The first one is the Panhandle Eastern order, isn't it, following the minutes of November 30th?

A. The minutes of November 30th itemize first Docket No. G-669——

Q. Here is what I have reference to (indicating), this instrument right here. Is this the Panhandle Eastern order? This is an order in connection with the Panhandle and Eastern application appearing on page 22,461?

A. I will let that record speak for itself.

Q. I notice on page 22,461 in the upper right-hand corner "November 30, 1946." Does that or not signify the date of adoption of that particular order?

A. Yes, that does signify the date of adoption of that order.

Q. What is the practice of the Commission, if it has a practice, with respect to whether or not the date of adoption of orders or the taking of actions, are dated here as indicated on this order appearing in the minute book beginning on page 22,461?

A. That question isn't clear at all, Mr. Moody.

Q. Well, does the Commission have any practice with respect to showing on its orders the date of adoption?

A. Yes, it has.

Q. What is that practice, please, sir?

A. The practice is to place a date up here in this location (indicating).

Q. The upper right-hand corner of the order?

A. The upper right-hand corner of the order, to show the date on which it was adopted.

Q. Is that on the first page of the order?

A. Yes, it is on page 1 of the order of November 30, 1946.

Q. Is that the usual and customary practice of the Commission or of you as Secretary of the Commission in writing its orders up?

A. I do not write its orders up. Do you mean in reproducing the orders?

Q. Yes, sir.

A. I recall that the Commission did on a certain date take a certain action. It is the practice to place in the upper right-hand corner the date on which it was adopted.

[fol. 376] Q. All right, thank you, sir. So far as the docket sheets that you have referred to here and which are identified as exhibits are concerned, is there any system there of showing the date of adoption of orders?

A. The practice is to list on the docket sheet whenever practical the date on which the order was actually adopted because the files are maintained chronologically and the docket sheet attempts to serve as an index and convenient reference to the file.

By Mr. Jones:

Q. The docket sheet does not show the date of actual docketing of the document?

A. It could be. It shows the date on which the order was actually adopted by the Commission.

Q. If it was entered on a subsequent date, the docket sheet would not show that?

A. Do you mean entered by the docket clerks on the docket sheet or entered by the Commission?

Q. I mean the docket clerks entering a notation on the docket sheet.

A. If they enter it a few days subsequent to the actual adoption of the order your question is whether they would put on the docket sheet the actual date?

Q. Whether there would be anything on the docket sheet to show the date they actually made the entry on the docket sheet.

A. I don't think so.

Q. There would be nothing of that character?

A. The docket sheet is only intended to be a convenient reference to what is contained in the files.

Q. Would you refer to Exhibit 8, please? I believe that is a certificate of service, isn't it? Acknowledgment of service is the way they have identified it.

A. All right.

Q. Does that exhibit show the time of day of service? It shows the date but does it show the time of day?

A. I don't see anything on it to indicate the time of day.

Q. Does the Commission maintain any official record showing the time of day at which any of these particular actions are taken?

A. I couldn't say whether or not they maintain that on any matters. I don't see any time of day noted on this one. There are a large number of docket clerks under my supervision. Possibly some of them would desire to make a notation as to the time of day.

Q. There is none on that?

A. None whatever on that.

[fol. 377] Q. Do you know whether or not there are any other records in the possession of the Commission that would show the time of day of the execution of that order?

A. No, I do not.

By Mr. Moody:

Q. Mr. Fuquay, did the Commission have or does the Commission have any policy about the sending of telegrams relative to actions taken by it with respect to whether or not such telegrams are or are not to be initialed by members of the Commission or the majority of them?

A. The Secretary has general authority to serve notification of the Commission's action without requiring the initials of the Commissioners on the notice. It is a regular part of his functions.

Q. Are there any instances in which the Commission follows the practice of authorizing telegrams to be sent only when initialed by the Commission or its members?

A. After the adoption of the order?

Q. In any matter.

A. It is customary to record the Commission's actions in its minutes. I can conceive of certain communications which the Commission might regard as of sufficient importance to justify placing their initials on the carbon. I don't know

of any at this time but I think it is possible there might be such communications.

Q. But you don't think at this time of any instance where that may be required by the majority of the Commission, that is, to initial the telegram before it is sent?

A. It would depend on the subject matter. I am sure there must be certain types of communications they would like to have their initials on. It is certainly not the normal practice when the Secretary sends out notice of the adoption of an order to get the commissioners' initials on the letter or telegram. That is the normal function of the Secretary.

By Mr. Jones:

Q. In this instance you feel it was within your own authority as Secretary to *initiate* the telegram?

A. I had that authority, yes.

Mr. Jones: I wonder if we might have a recess for two or three minutes to sort of check up on where we are. There are three of us and we are trying not to duplicate the questions.

[fol. 378] (At this point, a short recess was had; after which, the taking of the deposition was resumed as follows:)

Mr. Moody: That is all.

Redirect examination.

By Mr. Turner:

Q. Mr. Fuquay, referring to the order of November 30, 1946, a certified copy of which has been identified here as Exhibit 5, is the photostat *the photostat* of the vault copy of that order?

A. It appears so to be, yes. The pages are numbered. I think it is.

Q. In the terms and provisions of the order is there any difference between this vault copy which has been identified as Exhibit 5 and the copy that is referred to as the file copy?

A. No, there is no difference in the terms and conditions.

Mr. Black: If you mean by "final copy" the master copy, we object to that because it is not in the record.

Mr. Turner: No, the "file copy".

By Mr. Turner:

Q. In other words, Mr. Fuquay, in neither the vault copy or the so-called file copy that has been referred to is there the word "contractual" in subdivision (3) of subparagraph No. 8 of paragraph B of the order. Do you understand the question?

A. No, you will have to read it.

(The question was read by the reporter.)

Mr. Moody: I object to it as leading.

The Witness: No, the word "contractual" is contained in neither copy.

By Mr. Turner:

Q. Are both the vault copy and the file copy word for word a correct copy of the order as adopted by the Commission on November 30, 1946?

Mr. Moody: We object to that because the master copy to which he has referred would be the best evidence and because it calls upon the witness for an opinion comparison of the so-called vault copy and the file copy of an instrument that is not available to these defendants and the testi-
[fol. 379] mony is secondary evidence. The question calls for secondary evidence.

Mr. Black: And it calls for a comparison of two writings, one of which cannot be produced.

By Mr. Turner:

Q. Referring to subdivision 2 appearing on page 5 of Exhibit 5, which subdivision immediately precedes subdivision 3 on page 6 that has been referred to subdivision 2 starts out with the words "*Panhdnale's* contractual and actual deliveries," and so forth.

As I understand the file copy has the word "contractual" stricken out immediately following the word 'Panhandle's."

Was that obviously a typographical error in the first instance?

Mr. Moody: Just a minute. It calls upon the witness for an opinion and conclusion.

The Witness: The word "contractual" is struck in subparagraph 3. I am not sure that you have made that per-

fectly plain. Whether it is an obvious typographical error, it was a typographical error to have the word "contractual" there because the word "contractual" in this particular place is not contained in the master copy.

Mr. Moody: Just a minute. We object to that for the reason the answer is an opinion and conclusion of the witness and further, the witness refers to what he calls the master copy which would be the best evidence of its content and it has not been available and will not be available to these defendants.

By Mr. Turner:

Q. In subdivision (3) on page 6 that we have been referring to, did the master copy of the order adopted by the Commission on November 30th contain the word "contractual" after the word "Panhandle's"?

Mr. Black: We object to that for the obvious reason that the master copy is not in the record and there is no way to institute a comparison. We can't institute it and he can't.

By Mr. Turner:

Q. Do you understand the question, Mr. Fuquay?

A. Yes. I have signed this file copy of the order as being [fol. 380] a true copy of the order adopted by the Commission on November 30, 1946, and I have signed it after the word "contractual" which was placed there through a typographical error—had been stricken in ink.

I have certified that is a true copy of the Commission's action of November 30th.

Q. And as corrected, in other words, without the word "contractual" appearing in subdivision (3), it is a correct, accurate reproduction of the order as fixed by the Commission on November 30 and written down on your master copy of the order?

Mr. Black: You agreed with me this morning that our object on to your reference to the master copy and the witness' reference would lie to all those questions without being repeated.

Mr. Turner: Based on your stated ground for objection, as I understand it, that since the——

Mr. Black: That no witness can get on the stand and detail the contents of a writing.

Mr. Moody: And that question is further objectionable as leading.

By Mr. Turner:

Q. As to the leading feature let me restate the question. Did the Commission put the word "contractual" in subdivision (3) of the order of November 30, 1946?

Mr. Moody: So I can make an objection, what are you referring to, Mr. Turner? Are you referring to the master copy or what copy are you referring to?

The Witness: You will have to make it clear as to subdivision (3) because there is another figure 3 on page 1 and I wouldn't want to make a mistake in my answer there.

By Mr. Turner:

Q. As I understand it, Mr. Fuquay, the Commission prescribed the terms and wording of the order of November 30, 1946 and they did it on November 30, 1946.

A. Yes, sir.

[fol. 381] Q. Now, in prescribing those terms did the Commission prescribe that the word "contractual" be in subdivision (3) appearing on page 6 of Exhibit 5?

Mr. Moody: Now, Mr. Turner, I want to ask a question for purposes of objecting. Whatever the Commission does in making orders is done in writing, is it not?

The Witness: Yes, it formally adopts its orders after they have been reduced to writing to the exact terms.

Mr. Moody: I object to that question because it heretofore appears from the testimony of the witness that there is existing what he calls a master copy, which he states the Commission had before it and approved, and that instrument would be the best evidence of its contents and what the Commission did, under the testimony of this witness.

Mr. Turner: Will you read the question back, please?

(The last question was thereupon read by the reporter.)

The Witness: No, it did not.

By Mr. Turner:

Q. So that Exhibit No. 5 is a full, true and correct copy of the order as fixed and prescribed by the Commission on November 30, 1946?

Mr. Moody: Just a minute. The question is leading.

Mr. Turner: I will reframe it then.

By Mr. Turner:

Q. Is the copy identified as Exhibit 5, a full, true and correct copy of the order as fixed and prescribed by the Commission on November 30, 1946?

A. It is.

Mr. Moody: Just a minute. We want to object to that question and to the answer too for the reason that the testimony shows that the Commission had before it what the witness has referred to as a master copy and, he has only identified the instrument of which Exhibit 5 is a copy as being a corrected copy of the so-called master copy.

Therefore the master copy is the best evidence and the witness' opinion as to whether or not this is what the Commission did is not only secondary evidence but also calls for [fol. 382] a conclusion of the witness and I want to ask a question for the purpose of additional objection.

So far as the original of which Exhibit 5 is a copy, Mr. Fuquay, is concerned, did the Commission ever see that instrument until after the mimeographed copies were prepared and the mimeographed copies put in the minute book and attached to the minutes of the meeting of November 30th?

So far as you know did the Commission ever see it?

The Witness: You refer to "original." I don't know what you mean by that.

Mr. Moody: You know what I am asking you. You told us that the Commission——

Mr. Turner: Is this for the purpose of an additional objection or are you cross-examining the witness?

Mr. Moody: For the purpose of an additional objection.

Mr. Turner: Go ahead.

Mr. Moody: Exhibit 5, as I understand you, is a photostatic copy of the instrument that follows the minutes there of November 30, 1946 in the minute book. Is that right?

The Witness: Yes, I think it is.

Mr. Moody: Now, then, did the Commission ever see the instrument of which Exhibit 5 is a copy until after it had been mimeographed and attached there to the minutes, so far as you know?

The Witness: I do not know whether they did or not.

Mr. Moody: In any event, that particular instrument that you have there in front of you and of which Exhibit 5 is a copy, is your vault mimeographed copy, is it not?

The Witness: It is the vault copy which contains the Commission's minute book of those dates.

Mr. Moody: And the Commission, prior to the time the [fol. 383] minutes of November 30th were presented to it, never had that copy before it, did it, as far as you know?

The Witness: I do not know whether they did or not.

Mr. Turner: For what objection are you inquiring, Mr. Moody?

Mr. Moody: I am trying to state my objection and I will take a lot less time in taking this man's deposition and questioning him too if you allow me to get the answer there. I will state the objection when I get the testimony as a basis for my objection.

Mr. Turner: To make the record clear, I have no objection to your cross-examining the witness as far as is proper, but I don't think it is proper for you to interrupt my examination unless it is necessary to lay the basis for your objection.

Mr. Moody: Two or three times I have stated that it is for the purpose of making an objection.

Will you read the question?

(The last question was read by the reporter.)

December 3rd, the date on which the Commission approved

Mr. Moody: Mr. Fuquay, between November 30th and the minutes of November 30th, it did not, as far as you know, have before it any purported order of November 30, 1946 except mimeographed copies, did it?

The Wjtness: I don't know. It had before it on November 30th at the time it began its meeting, a copy of the draft of the proposed order and, presumably they still retained their copy.

Mr. Moody: I said between November 30 and December 3 did the Commission have any copy of it other than a mimeographed copy that you know of?

The Witness: I don't know whether they did or not.

Mr. Moody: You don't know whether or not they did?

The Witness: No.

[fol 384] Mr. Moody: Did you ever have occasion after November 30th to present to the Commission the so-called master copy?

The Witness: No, I did not.

Mr. Moody: When you say Exhibit 5 is a correct copy of what the Commission did on November 30th, you mean as compared with your so-called master copy it is a copy of what the Commission did?

The Witness: I testified that this is a photostatic copy apparently of the copy contained in the Commission's minute books. Exhibit 5 is a photostatic copy made from the document contained in the Commission's minute books.

Mr. Moody: And in so far as you say it is a correct statement of what the Commission did on November 30th, you mean it is as compared with the master copy to which you referred, do you not?

The Witness: Yes. I state what is contained in the minute books is a true copy of what the Commission did on November 30th.

Mr. Moody: Now then, we object to both the question propounded and the answer given by the witness prior to the time I examined him, because the master copy would be the only evidence of the action of the Commission—the best evidence—and the comparison which the witness makes by his answer involves his opinion and involves secondary evidence.

Mr. Turner: Due to this prolonged examination for the announced purpose of stating an objection, I don't recall exactly the wording — my question. I will ask an additional question.

By Mr. Turner:

Q. Did you, Mr. Fuquay, strike out any word in the order on your own initiative?

A. Which order to you have reference to, which copy of which order?

Q. I mean by that, did you put in any word in the order of November 30, 1946 as shown by Exhibit 5, or did you take out any word in that order other than that which was fixed by the Commission on November 30, 1946?

[fol. 385] Mr. Black: We object to that upon the ground that it again calls for a comparison of the two documents and only one of the documents is in the record and the witness cannot be cross-examined about the comparison. If only one is in the record cross-examination is futile.

Mr. Turner: Read my question back, please.

(The question was read by the reporter.)

Mr. Black: We have the additional objection that there is nothing in the record to show what the Commission put in or took out.

By Mr. Turner:

Q. Do you understand the question?

A. Yes, I understand the question. No, I did not.

At the time of serving the order of November 30, 1946 it was discovered there was a typographical error in subdivision (3) at the top of page 6, so I had struck from that particular copy the word "contractual" to make it conform with what was the true action of the Commission.

Mr. Black: The same objection and to the answer, too.

Mr. Turner: That is all.

(At this point, a short recess was had; after which, the taking of the deposition was resumed as follows:)

Recross Examination by Mr. Jones.

By Mr. Jones:

Q. This word "contractual" which was stricken, Mr. Fuquay—do you recall whether it was in the copies which were handed out and mailed to the parties—stricken in those copies too?

A. I don't recall unless I could actually see those copies that went out. It is quite possible that it could have been.

Q. It is your understanding, however, that the thing had been mimeographed in that form when it was stricken?

Regardless of how the error occurred, it was mimeographed in there and stricken out in ink?

A. Here is what appears to be a mimeographed copy in the files (indicating) and the word "contractual" is stricken in ink.

Q. So it would appear from that that as that particular page was run off on the mimeograph machine, the word "contractual" was in that particular part of the order?

[fol. 386] A. It would appear that the word "contractual" was cut on the stencil from which that page was run.

Q. And it was not X-ed out on the stencil?

A. That it was not what?

Q. That it was not X-ed out on the stencil, the X-ing out being done by ink.

A. I don't know what was done on the stencil but it showed pretty clearly on the mimeographed copy before I had it struck in ink.

Q. Will you examine the file copy and examine the word "contractual" as it appeared at the top of page 6 and state whether it was X-ed out either on the stencil or by typewriter?

A. On the copy I have before me it is clearly struck out by ink.

Q. And by ink only?

A. Yes.

Q. Would you refer to Exhibit 9 for a second and before we proceed to that, do you recall, Mr. Fuquay, which was the first stencil copy, whether the file copy, page 6, would be the first stencil copy or whether the vault copy of page 6 would be?

A. No, I do not.

Q. Handing you Exhibit 9 which purports to be a letter dated December 2, 1946 enclosing copies of orders entered by the Commission on November 30, 1946 in Docket G-669, does that letter show the time of day at which it was dispatched or delivered to the post office?

A. I see no indication of the time of day.

Q. And do you know or do your records disclose the time of day on December 2nd or any subsequent date at which that letter was deposited in the mail?

A. I have not made a check of the records to determine whether that is a fact or not.

Q. Is such a record ordinarily kept regarding letters, as to the time of day at which they are deposited in the mail?

A. The answer to that is somewhat like the previous answer I gave a while ago.

Some of the employees may make a record on their desk and keep it there to show that they got it out by a certain time. I could not say positively there is not such a record maintained by anybody.

Q. So far as you know there is no such record of the time of day at which that was delivered or placed in the mails?

A. I do not know of any such record.

[fol. 387] Mr. Jones: Thank you. That is all.

Mr. Turner: That is all.

(Whereupon, at 4:45 p. m., on Monday, January 26, 1948, the taking of the deposition of the witness Leon M. Fuquay was closed.)

The taking of the deposition of Leon M. Fuquay which was closed on Monday, January 26, 1948, was by agreement of counsel reopened on Tuesday, January 27, 1948 at 12:15 p. m. at the offices of the Federal Power Commission, 18th and Pennsylvania Avenue, Northwest, Washington, D. C.

Appearances:

For the plaintiff, Phillips Petroleum Company: Harry D. Turner, Esq.

For the defendant Stanolind Oil and Gas Company: Charles L. Black, Esq., and Dan Moody, Esq.

For the defendant Skelly Oil Company: John F. Jones, Esq.

For the defendant Magnolia Petroleum Company: Dan Moody, Esq.

LEON M. FUQUAY, having been previously sworn by the notary public above named, recalled for further cross-examination, further deposes and testifies as follows:

Cross-examination.

By Mr. Moody:

Q. Mr. Fuquay, I hand you a document which the reporter has marked as Exhibit 22. State what that document is, please, sir.

A. May I ask if this is the document which was produced yesterday and which I identified?

Q. Yes, sir.

A. And certified yesterday?

Q. Yes, it is the document.

A. Whose possession has this been in since yesterday?

Mr. Moody: The reporter has had it.

The Notary: It has been in my possession.

The Witness: What is the question?

Mr. Moody: I will restate it.

By Mr. Moody:

Q. I hand you the document which the reporter has [fol. 388] marked Exhibit 22 and ask you to state what the document is, please, sir.

A. I will read the certification:

"I, Leon M. Fuquay, Secretary of the Federal Power Commission and official custodian of the records of said Commission, do hereby certify that the attached ninety-eight pages are true copies of Opinion No. 147 entered January 17, 1947, and Commissioner Draper's Dissenting Opinion dated February 3, 1947 and Commissioner Olds' Dissenting Opinion dated February 7, 1947, in the Matter of Michigan-Wisconsin Pipe Line Company, Docket No. G-669."

Q. Are those the only opinions that were written in Docket G-669, the matter of Michigan-Wisconsin Pipe Line Company application for a Certificate of Public Convenience and Necessity?

A. The record will show that. I have not made a search of that situation.

Q. Do you know whether any other opinions were written?

A. I have not checked; no, not without checking.

Q. Would the docket sheet show that?

A. I don't know whether the docket sheet will show that but I am confident the Commission's records will show whether or not there was another opinion written in this case.

Q. Were any opinions written prior to the opinion of January 17, 1947 which is attached to that certificate, or is a part of that exhibit?

A. I would have to go through the record to determine. I don't know.

Q. How long would it take you to do that, Mr. Fuquay?

A. I don't know. I would suggest that we have a public reference room here and you can easily determine this yourself.

You are asking me to state whether or not there is something else and that would require research into the records to see if there is something else. Then I could state I had made this study and research and either found it or did not find it. I have not made such a study.

Q. If there is any other opinion we would like to develop that fact and if there is not any other opinion we would like to develop that fact.

A. I think that would be very easy for you to find out.

[fol. 389] Q. How may it be determined, please, sir; what records would it be necessary to examine?

A. You have reference only to Docket G-669?

Q. Yes, sir.

A. As to whether or not any opinion was entered by the Commission prior to the entry of Opinion 147 on January 17, 1947, in that proceeding?

Q. Yes, sir.

A. I think I could find out fairly easily.

Q. You could?

A. Yes.

Q. Would the docket sheet in that case serve that purpose or not?

A. I don't know whether it would or not.

Q. If we could get that information——

A. I can establish the fact positively whether there was or was not, based on my search, and I would be glad to testify to it.

Q. All right, sir. Could you do that within the time you have available right now?

A. Yes, I will try to do that.

Q. All right, sir. We will appreciate it if you will. We will wait for you. We will suspend while you make the search.

(At this point, a short recess was had; after which, the taking of the deposition was resumed as follows:)

By Mr. Moody:

Q. Mr. Fuquay, have you made an examination of the records to determine whether or not any opinions were written by the Commission or by any members of the Commission in the matter of Michigan-Wisconsin Pipe Line Company, Docket No. G-669, having to do with the issuance of Certificate of Convenience and Necessity, prior to the date shown on the opinions which have been identified by the reporter as Exhibit 22?

A. I have had a diligent search made of the records of the Commission and as a result of such search it appears that

there was no opinion issued in Docket G-669 prior to the entry of Opinion No. 147 on January 17, 1947.

Q. That answer, Mr. Fuquay, was not directly responsive to my question. I really expected an answer yes or no.

A. You asked me if I made a search.

Q. Yes.

A. I will have to say I had a search made.

Q. What was the result of the search, please, sir.

A. The result of the search did not disclose any opinion entered prior to that date in that proceeding.

Q. Mr. Fuquay, do you know whether or not a requisition was issued for the mimeographing of what has been identi- [fol. 390] fied in the record as Exhibit No. 5 (Exhibit 5 handed to witness)?

A. No, I do not.

Q. Where could we determine whether or not a requisition was issued for mimeographing of that instrument?

A. I do not know.

Q. Is it the practice of the Commission or the officers of the Commission or of your office as Secretary, to issue requisitions for the mimeographing of instruments?

A. It may issue requisitions. It may call on the telephone to have the work done, or it may take the master draft down there and physically turn it over to the operators.

Q. Is there any place in the Commission where we could determine whether or not such a requisition was issued and if so; where is that place, please, sir?

A. I do not know.

Q. Do we have your permission to inquire of the mimeographing room whether or not there is such a requisition there?

A. I have no authority to say whether you can or can not. The mimeographing room is not under my supervision.

Mr. Moody: That is all, Mr. Fuquay.

(Discussion off the record.)

(At this point, a short recess was had; after which, the taking of the deposition was resumed as follows:)

By Mr. Moody:

Q. Mr. Fuquay, do you have before you at this time the records of the mailing of letters to Mr. Frank L. Conrad, Mr. John S. L. Yost and Mr. A. J. Mayotte, Secretary of Michigan Gas Storage Company, on December 2, 1946?

A. I have a record here which was prepared and maintained by the mail room showing that they dispatched from the mail room on December 2, 1946, registered mail to the individuals you named.

Q. Did those pieces of mail include copies of what has been identified in the record as Exhibit No. 5?

A. The record maintained by the mail clerk made a reference opposite the names of the parties to whom these registered letters were sent as follows: "Re orders of November 30, 1946."

Mr. Moody: Mr. Turner, I don't know that that will be material to either one of us in the case, but is that proof [fol. 391] satisfactory to you or do you want certified copies of the entry attached to his deposition?

Mr. Turner: Of the entry he last read.

Mr. Moody: Yes.

Mr. Turner: That won't be necessary. However, the record of the mail room showing the sending of the registered letters together with the receipt which Mr. Fuquay has here of the postal department, dated December 2, 1946, I take it as to either of those two papers that it will be sufficient to introduce them in evidence on either side if certified copies of those papers are later produced at the trial of the case.

Mr. Moody: Yes.

Mr. Black: We, of course, will want to get certified copies of those papers.

Mr. Moody: I have no further questions.

Mr. Turner: Nothing further.

The Witness is now excused, I take it.

Mr. Moody: As far as I am concerned he is.

Subscribed and sworn to before me this 2nd day of February, 1948. —— ——, Notary Public in and for the District of Columbia.

District of Columbia, ss.

I, Mary K. Hoyez, a notary public in and for the District of Columbia, do hereby certify that the foregoing deposition of Leon M. Fuquay was taken on behalf of the plaintiff in a certain cause now pending and undetermined in the District

of the United States for the Northern District of Oklahoma, wherein Phillips Petroleum Company, a corporation, is plaintiff and Skelly Oil Company, a corporation, et al., are defendants, before me at the offices of the Federal Power Commission, 18th Street and Pennsylvania Avenue, North-[fol. 392] west, Washington, D. C., beginning on Monday, January 26, 1948, at 10:00 A. M. and continuing on Tuesday, January 27, 1948; that Harry D. Turner, Esq., was present on behalf of the plaintiff, Charles L. Black, Esq., and Dan Moody, Esq., were present on behalf of the defendant Stanolind Oil and Gas Company, Dan Moody, Esq., was present on behalf of the defendant Magnolia Petroleum Company and John F. Jones, Esq., was *presented* on behalf of the defendant Skelly Oil Company during the taking of said deposition; that the witness was duly sworn by me before the commencement of his deposition; that the testimony so given by said witness was reduced to writing by me by means of shorthand and thereafter transcribed into typewriting under my direction; that the corrections made by pen and ink on pages 23 and 42 were made by the witness because of an apparent mishearing by the reporter; that the foregoing 129 pages of typewritten matter represent a true and correct transcript of the proceedings had according to the best of my ability and belief; that the deposition was read by the witness and signed in my presence on the 2nd day of February, 1948.

I further certify that I am not connected by blood or marriage with any of the parties to this suit, nor am I a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, or financially interested in the action or interested directly or indirectly in the matter in controversy.

In Witness Whereof I have hereunto set my hand and seal this 2nd day of February, A. D. 1948.

Mary K. Hovez, Notary Public in and for the District of Columbia.

File wrapper endorsed: Filed February 5, 1948. Noble C. Hood, Clerk.

Opened and published by Judge Savage on March 1, 1948. Noble C. Hood, Clerk.

[fol. 393] Stipulation re Exhibits

It is agreed by and between the parties plaintiff and defendant that the Clerk of the Court, in making the transcript of the record on appeal, need not include as a part of the exhibits which consist of certified copies of files, documents and records in the Office of the Federal Power Commission, the certificates of true copy and executed by Leon M. Fuquay, Secretary of said Commission, which are attached to each such exhibit, except, at plaintiff's instance, the certificate attached to plaintiff's Exhibit 5, which certificate plaintiff desires shall be included in the transcript.

It is further agreed that this stipulation shall be included in the record on appeal.

Dated this 16 day of July, 1948.

Phillips Petroleum Company, Plaintiff, by Harry D. Turner, One of Its Attorneys. Skelly Oil Company, Defendant, by W. P. Z. German, One of Its Attorneys. Stanolind Oil and Gas Company, Defendant, by Ray S. Sellom, One of Its Attorneys. Magnolia Petroleum Company, Defendant, by Dan Moody, Its Attorney.

Filed July 23, 1948.

[fol. 394] **Plaintiff's Exhibits**

PLAINTIFF'S EXHIBIT 1

Plaintiff's Exhibit No. 1 consists of six docket sheets of the Federal Power Commission, front and back sides, in Docket No. G-669. In lieu of printing the exhibit in full the following excerpts from and condensation of the exhibit are printed by stipulation of the parties:

September 24, 1945. Filed application for certificate of public convenience and necessity; together with Exhibits 1 through 7.

* * * * *

November 1, 1945. Filed petition of Public Service Commission of Wisconsin for leave to intervene.

* * * * *

November 6, 1945. Order entered permitting Public Service Commission of Wisconsin to intervene, pursuant to petition filed 11/1/45.

• • • • •

March 13, 1946. Filed Amendment to Application filed 9/24/45.

• • • • •

July 22, 1946. Filed Second Amendment to application filed 9/24/45.

• • • • •

(Entries were made of numerous hearings before the Commission commencing on January 8, 1946, and held from time to time thereafter until the oral argument to the Commission en banc was concluded on November 23, 1946, in G-669, and was concluded on November 26, 1946, in G-731.)

• • • • •

November 30, 1946. Findings and order entered denying Motion filed 11/19/46 by Panhandle Eastern Pipe Line, to Dismiss application filed 9/24/45.

November 30, 1946. Findings and order entered issuing certificate of public convenience and necessity, pursuant to application filed 9/24/45, as amended, subject to certain conditions: (summarizing them).

• • • • •

[fol. 395] November 30, 1946. Telegraphic notice of findings and orders of 11/30/47 sent to the following: Michigan-Wisconsin Pipe Line Co., Panhandle Eastern Pipe Line Co., Michigan Gas Storage Co., and other parties appearing on list attached to said notice.

December 2, 1946. Orders entered 11/30/46 served on: Michigan-Wisconsin Pipe Line Company (R. 12/6/46; S. 12/4/46; #443504), Panhandle Eastern Pipe Line Company (R. 12/4/46; S. 12/3/46; #443505), Michigan Gas Storage Company (R. 12/9/46; S. 12/5/46; #443506).

December 2, 1946. Filed Acknowledgment of Michigan-Wisconsin Pipe Line Company and Panhandle Eastern Pipe Line Company of service of orders entered 11/30/46, on 12/2/46.

• • • • •

December 11, 1946. Filed applicant's Request for extension of time for issuance of supplemental order referred to in order of 11/30/46, together with copy of proposed contract between Panhandle Eastern and Michigan Consolidated Gas Company, and notice of service thereof on Panhandle on this day.

* * * * *

December 13, 1946. Filed Lease dated 12/9/46, between Michigan Consolidated Gas Company and Michigan-Wisconsin Pipe Line Company, pursuant to order 11/30/46.

* * * * *

December 13, 1946. Filed application of Austin Field Pipe Line Company for certificate, pursuant to order of 11/30/46 and designated G-834.

December 14, 1946. Order entered modifying paragraph (B) (viii) of order issuing certificate entered 11/30/46 by substituting 30 days for 15 days for issuance of supplemental order (12/31/46) (Chm. Olds and Commr. Draper not participating).

December 16, 1946. Order last above served on: Michigan-Wisconsin Pipe Line Co. (R. 12/26/46; S. 12/18/46; #443751); Panhandle Eastern Pipe Line Co. (R. 12/18/46; S. 12/17/46; #443752), Michigan Gas Storage Company (R. 12/26/46; S. 12/18/46; #443753).

[fol. 396] December 17, 1946. Notice of order entered 12/14/46 sent to Federal Register for publication. (Pub. 12/20/46; Vol. 11, No. 247, pp. 14576.)

* * * * *

December 26, 1946. Filed application of Michigan Consolidated Gas Company for certificate, pursuant to order of 11/30/46 and designated G-839.

December 27, 1946. Filed Application of Panhandle Eastern Pipe Line Company for Reconsideration and Vacation of Order Entered 11/30/46, or in the Alternative, for Rehearing, together with Exhibits A and B, and Certificate of John W. Scott, showing service thereof on parties of record on 12/27/46.

December 27, 1946. Filed Application of Panhandle Eastern Pipe Line Company for Rehearing of Denial of Motions

to Dismiss, together with Certificate of John W. Scott showing service thereof on parties of record on 12/27/46.

* * * * *

December 30, 1946. Filed Petition of the City of Detroit, Mich., for Reconsideration and Vacation of Order Entered 11/30/46, or, in the Alternative, for Rehearing.

* * * * *

December 30, 1946. Filed Application of National Coal Association and United Mine Workers of America, for Reconsideration, Revocation and Abandonment of Order entered 11/30/46, or in the Alternative a Rehearing Thereon, together with Certificate of Tom J. McGrath, showing service thereof on parties of record on 12/30/46.

December 30, 1946. Order entered supplementing order of 11/30/46, issuing certificate, as modified by order of 12/14/46; and reopening proceeding for limited purpose. (Olds, Chrmn., not participating, Draper, Commr., dissenting.)

* * * * *

January 3, 1947. Order entered fixing date of hearing for 1/15/47, 10:00 A. M. (EST), 1800 Pa. Aven. N. W., Wash., D. C., in Reopened Proceedings for Limited Purpose and allowing interested State Commissions and inter-
[fol. 397] venors of record to participate. (Comrs. Draper and Olds not participating.)

* * * * *

January 10, 1947. Filed Application of Panhandle Eastern Pipe Line Company, for Reconsideration and Vacation, or in the alternative for a Rehearing of the Commission's Supplemental Order of December 30, 1946, and Related Order of January 3, 1947, Fixing Date of Hearing, and request for stay of said orders, together with Certificate of John W. Scott, showing service thereof on parties of record on 1/10/47.

January 13, 1947. Filed applicant's Notice accepting certificate of public convenience and necessity, pursuant to order of 11/30/46, together with Certificate of Charles V. Shannon showing service on parties of record on 1/13/47.

January 14, 1947. Order entered Denying application of

Panhandle Eastern Pipe Line Company for Rehearing of Denial of Motions to Dismiss, filed 12/27/46.

January 14, 1947. Order entered Denying applications for Reconsideration and Vacation or for Rehearing filed 12/27/46 by Panhandle Eastern Pipe Line Company and on 12/30/46 by City of Detroit, Michigan, and jointly by National Coal Association and United Mine Workers of America, without prejudice to filing of other such applications for rehearing 30 days from date of issuance of the opinions, or of the supplemental order contemplated in the Commission's order of 11/30/46; and Denying application of Panhandle Eastern Pipe Line Company filed 1/10/47. (Draper, c., and Olds, c., not participating.)

• • • • • •

January 15, 1947. Hearing held, pursuant to order of 1/3/47. (Recessed to 1/16/47.) (Tr. rec'd. 1/16/47.)

• • • • • •

January 16, 1947. Hearing held (recessed to 1/17/47). (Transcript rec'd. 1/17/47.)

• • • • • •

January 17, 1947. Hearings held (concluded). (Tr. rec'd. 1/20/47.) (Briefs waived.) (Corrections due 1/27/47.)

[fol. 398] January 17, 1947. Opinion No. 147 referred in the orders of 11/30/46; 12/14/46 and 12/30/46, filed.

February 3, 1947. Filed Commissioner Draper's dissenting Opinion.

February 7, 1947. Filed Commissioner Olds' dissenting Opinion.

• • • • • •

February 20, 1947. Supplemental Opinion No. 147-A adopted and order entered supplementing order of 11/30/46, as amended. (Draper and Olds, commrs., dissenting.) (Olds, c., opinion to be filed.)

• • • • • •

May 6, 1947. Order entered Modifying Order of 11/30/46, Opinion No. 147 in relation thereto, and supplemental Order of 12/30/46. (Comm'r. Draper dissenting; Comm'r. Olds not participating.)

• • • • • •

PLAINTIFF'S EXHIBIT 2

Before the Federal Power Commission

Washington, D. C.

Docket No. G-669.

In the Matter of Michigan-Wisconsin Pipe Line Company*

Amended Application for a Certificate of Public Convenience and Necessity

(Received September 24, 1945. Federal Power Commission)

Michigan-Wisconsin Pipe Line Company (hereinafter referred to as the "applicant") hereby applies under Section 7 of the Natural Gas Act, as amended, for a certificate of public convenience and necessity to authorize: (1) [fol. 399] its construction and operation of a natural gas pipe line extending from the Hugoton-Panhandle Fields in Texas to the Austin Field in Michigan; (2) its operation of the Austin Field and the pipe lines and other facilities appurtenant thereto which are now owned by Michigan Consolidated Gas Company, as well as a proposed pipe line from the Austin Field to Detroit and Ann Arbor, which will be constructed by Michigan Consolidated (either directly or through a wholly-owned subsidiary organized for that purpose); and (3) its acquisition of such facilities from Michigan Consolidated, as hereinafter set forth. In support of this application and in conformity with Section 57.5 of the Commission's Provisional Rules of Practice and Regulations, applicant respectfully shows:

(A) The exact legal name of the applicant; if the applicant is a corporation, the state or territory under the laws

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* On April 2, 1945, an application was filed in this Docket by American Light & Traction Company, which set forth (p. 2) that the "Applicant proposes to organize a wholly owned subsidiary under the laws of the State of Delaware, with name of Michigan-Wisconsin Natural Gas Pipe Line Company, to construct, own and operate the pipe line for which a certificate of public convenience and necessity is asked." As thus proposed, the present applicant, Michigan-Wisconsin Pipe Line Company, has been organized as a subsidiary of American Light & Traction Company.

of which the applicant was organized, the location of applicant's principal place of business, the names of all states where applicant is authorized to do business; and a concise but comprehensive description of the existing business, operations and properties of the applicant, with particular reference to the transportation and sale of natural gas.

The exact legal name of applicant is Michigan-Wisconsin Pipe Line Company. Applicant is a corporation organized and existing under the laws of the State of Delaware, and its principal place of business is 100 West 10th Street, Wilmington, Delaware. At the present time applicant is not authorized to do business in any other state, but it will be licensed to do business in all states necessary in the conduct of its business.

Pursuant to the Memorandum Opinion and Order which the Securities and Exchange Commission issued on June 16, 1945, In the Matter of the United Light and Power Company, et al. (Holding Company Act Release No. 5869), applicant was organized as a wholly-owned subsidiary of American Light & Traction Company, with an initial capital of $5,000, represented by 50 shares of $100 par value capital stock. In said Opinion and Order the Securities and Exchange Commission reserved jurisdiction with respect to the distribution to be made of the initial capital stock of [fol. 400] applicant, which may be either transferred to Michigan Consolidated Gas Company as a contribution to paid-in surplus, or distributed in liquidation to the common stockholders of American Light & Traction Company.

American Light & Traction Company (hereinafter referred to as "Traction") is a corporation organized and existing under the laws of the State of New Jersey, and at the present time its business is exclusively that of a holding company. As such it owns and holds all the issued and outstanding common capital stock of (1) Michigan Consolidated Gas Company, (2) Madison Gas and Electric Company, (3) Consolidated Building Company, (4) Milwaukee Solvay Coke Company and 99.239% of the common capital stock of (5) Milwaukee Gas Light Company. The first named is a Michigan corporation with principal place of business at Detroit, Michigan. All the others are Wisconsin corporations with principal place of business at Milwaukee, Wisconsin, with the exception of Madison Gas and Electric Company which is at Madison, Wisconsin.

With respect to the existing business, operations and

properties of the other subsidiaries of Traction, with particular reference to the transportation and sale of natural gas, applicant states that Michigan Consolidated Gas Company is engaged in the production, transportation and distribution of natural gas in various cities, towns, villages and townships within the State of Michigan. For convenience in description, its activities may be said to be carried on in nine separate districts, namely, those of Detroit, Ann Arbor, Grand Rapids, Muskegon, Ludington, Mount Pleasant, Greenville-Belding, Big Rapids and Production and Pipe Line District. The present estimated aggregate population served is 2,735,500 of which approximately 84% is in the Detroit District.

The Detroit District comprises the City of Detroit, the cities of Hamtramck, Highland Park, Dearborn, River Rouge, Grosse Pointe, Melvindale, Wyandotte and Lincoln Park, together with twenty-two contiguous or adjacent villages and townships in Wayne County, Michigan, its area being approximately 467 square miles.

[fol. 401] Michigan Consolidated Gas Company is engaged in the production of natural gas from fields within the State of Michigan and holds leaseholds upon a considerable amount of developed and undeveloped acreage. It owns approximately 4,000 acres of land in Mecosta County, Michigan, comprising the Austin Gas Field and has repressured it as a storage reservoir. In 1944, it produced in Michigan approximately 1,100,000 Mcf of natural gas, purchased from producers within the State of Michigan approximately 5,900,000 Mcf and purchased from Panhandle Eastern Pipe Line Company approximately 32,000,000 Mcf, a total of 39,000,000 Mcf. It owned at the close of 1944, 334 miles of lines used in the gathering and transmission of Michigan natural gas. It produces manufactured gas to provide for peak demands in excess of its supply of gas furnished under contract by Panhandle Eastern Pipe Line Company, to level peak demands, to supply two small communities, and to provide for emergencies such as pipe line failure.

Traction's subsidiaries in Wisconsin neither transport nor sell natural gas. They manufacture coke oven gas, water gas and butane air gas for distribution. Milwaukee Gas Light Company serves an estimated population of 790,000 in Milwaukee and vicinity, its sales of manufactured gas having been 10,145,460 Mcf in 1944. Madison Gas and Electric Company serves an estimated population of 74,-

760 in Madison and vicinity, its sales of manufactured gas having been 1,178,460 Mcf in 1944.

(B) The name, title and post office address of the person to whom correspondence or communications in regard to the application are to be addressed. Unless advised to the contrary, the Commission will serve all notices, orders, and other papers, service of which is required, upon the person so named.

Frank L. Conrad, President, Michigan-Wisconsin Pipe Line Company, 2200 Bankers Building, 105 West Adams Street, Chicago 3, Illinois.

(C) A brief but accurate description of the project or facilities for which a certificate is sought and the dates on which it is intended to begin and complete construction or acquisition.

[fol. 402] The project consists of a natural gas pipe line to be operated in conjunction with gas storage fields, designed primarily to provide an adequate, dependable and long term supply of natural gas at reasonable cost for Michigan Consolidated Gas Company for ultimate distribution in the metropolitan area of Detroit, Grand Rapids, Muskegon, Ann Arbor and all other districts served by it within the State of Michigan, and for Milwaukee Gas Light Company in Milwaukee, Wisconsin, and Madison Gas and Electric Company, subsidiaries of American Light & Traction Company; and as an economic incident thereto, such markets along the right of way in the states of Missouri, Iowa, Illinois, Wisconsin, Michigan and Indiana as may be economically served, including certain markets to be furnished by subsidiaries of The United Light and Railways Company.

When finally completed, the main line will be approximately 1,246 miles in length, the initial construction being limited to approximately 1,076 miles of the total length. Eight hundred sixteen miles will be constructed of 26" and the remainder of 22" O.D. electric weld steel pipe. project further includes the construction of the necessary lateral or branch lines. The initial construction includes one 900 lb. compressor station near Section 8, Block 1, Public Free School Land Survey, Hansford County, Texas, to be followed by additional pumping stations from year to year as required by load growth. Initial capacity of the line out

of the Hugoton-Panhandle Fields will be 150,000 Mcf per 24 hours with its ultimate capacity 320,000 Mcf.

Michigan Consolidated Gas Company now owns the Austin gas storage field. It also owns certain other gas fields in the State of Michigan which may be useful for storage purposes. If this project be authorized and constructed, Michigan Consolidated Gas Company will immediately construct, or cause to be constructed, approximately 140 miles of 26" O.D. line connecting the Austin gas storage field with the Detroit area together with a compressor station at the Austin field. It will also drill the necessary additional wells and construct an enlarged gathering system in the Austin gas storage field. At such time as the applicant is permitted to furnish the entire natural gas requirements of [fol. 403] Michigan Consolidated Gas Company, it will buy all these properties, including the gas storage fields and those pipe lines now connected with the storage fields and used by Michigan Consolidated Gas Company to supply its Western Michigan properties. Pending the acquisition of the Michigan facilities by applicant, such facilities will be operated by applicant pursuant to its agreement with Michigan Consolidated.

Through the use of the storage fields, a maximum day's requirements in excess of 630,000 Mcf can be supplied by the fully completed system.

It is planned to begin construction on or about March 1, 1946, and to complete this initial installation on or before October 31, 1947.

(D) A statement setting forth the service proposed to be rendered by applicant, showing communities proposed to be served presently and within the next five years, with the population of each, main line industrial customers, sales or interchange with other natural gas companies, and any other service. In describing such other service, furnish:

(1) The name of any other gas company rendering service within any county (or other local territorial unit of similar size where not within a county) in which any community or customer to be served by applicant is located, together with a general statement of pertinent facts as to the extent and nature of such existing service, specifying whether such other gas company is serving natural, artificial or mixed gas.

(2) A detailed statement of pertinent facts as to existing service by such gas company, including a showing as to (a) the adequacy of the present service and plant, and available supplies of gas, (b) the public need for further service, and (c) the potential market which could be served economically through the proposed extension of facilities.

The service proposed to be rendered by the project, initially and for the first four years, will consist of supplying Michigan Consolidated Gas Company with all its requirements of natural gas in excess of those supplied under contract by Panhandle Eastern Pipe Line Company, delivered [fol. 404] at the Austin gas storage field in Michigan, and the entire natural gas requirements of the following cities and towns, and the municipalities contiguous thereto:

Wisconsin	Shenandoah	Webster City
Milwaukee	Red Oak	Chariton
Racine	Indianola	Washington
Beloit	Winterset	Grinnell
Janesville	Avoca	Albia
Madison	Oakland	Clarinda
	Griswold	Tama
Illinois	Walnut	Toledo
Rock Island	Carson	Mt. Pleasant
Moline	Waterloo	Osceola
Iowa	Burlington	Colfax
Des Moines	Marshalltown	Corning
Davenport	Keokuk	Bedford
Cedar Rapids	Ft. Madison	Villisca
Ottumwa	Newton	Mt. Ayr
Ft. Dodge	Cedar Falls	Mystic
Iowa City	Centerville	Missouri
Oskaloosa	Creston	Maryville.

The natural gas supplied in Wisconsin, Illinois, Iowa and Missouri will be delivered at the city gates of each of the communities.

In the fifth year, all the above will be supplied, plus the entire natural gas requirements of Michigan Consolidated Gas Company which will then be delivered at the city gates in each district.

It is estimated that the population of the area to be served is approximately 4,600,000.

Exhibit I shows, in addition to the names of the various communities proposed to be served, their location as to

county and state, their estimated population including that of the contiguous areas to be served, the names of the distributors in such communities, the kind of gas distributed and, if natural gas, the source of supply.

Michigan Consolidated Gas Company is the largest distributor of natural gas for local consumption in the State of Michigan. It serves eight districts, each of which in- [fol. 405] cludes the towns, villages and municipalities adjacent to and surrounding the city for which each district is named. The estimated population served in each district is as follows:

Detroit District	2,295,000
Grand Rapids District	240,000
Muskegon	110,000
Ann Arbor	57,000
Mount Pleasant	10,500
Greenville-Belding *	9,300
Ludington (manufactured gas)	8,700
Big Rapids	5,000
Total Population Served	2,735,500

* Belding is now supplied with manufactured gas but will be converted to natural gas during 1945.

Michigan Consolidated Gas Company is purchasing its natural gas requirements for the Ann Arbor and Detroit Districts from Panhandle Eastern Pipe Line Company under contracts expiring December 31, 1951. By these contracts its supply is limited to a maximum delivery of 2,000,000 cubic feet in any one day at Ann Arbor and 125,000,000 cubic feet at Detroit, and notwithstanding its public demand has gradually risen to quantities substantially in excess of these contractual amounts it has been repeatedly refused additional gas by the pipe line company. Not only has the actual demand greatly exceeded the contractual provisions but there is a very large potential demand, particularly for domestic heating, which the distributing company will be called upon to serve.

In order that the public in these areas may be convenienced with the service demanded, applicant proposes to serve only the requirements of Michigan Consolidated Gas Company over and above the contractual requirements until

the existing contracts are terminated when it will take over and supply the full requirements.

The natural gas supplied by Michigan Consolidated Gas Company to all the Districts other than Ann Arbor and Detroit is produced from several natural gas fields in Michigan. This gas is obtained partly by purchase at the well-[fol. 406] head and partly by production from its own wells. Michigan fields from which Michigan Consolidated Gas Company obtains its gas are being rapidly depleted and were not, during 1944, capable of producing amounts sufficient to meet the maximum days' requirements of the Districts served. This situation was met in 1944 and during the winter of 1944-45 by drawing on gas which had been stored in the Austin storage field during periods of light demand. It is expected that within a very short time production from these Michigan fields will become wholly inadequate, and that practically the entire requirements of these Districts will be supplied by the proposed pipe line.

It is not contemplated that gas will be sold directly to any domestic, commercial or industrial consumer, nor is it contemplated that gas will be sold to any other natural gas pipe line company, except in possible emergencies where exchange agreements may be arranged.

Other communities located sufficiently close to the pipe line system to make service to them economically feasible may be served if a public demand for such service develops.

(1) A list of the other gas companies rendering service within the counties in Michigan in which applicant proposes to render service, in all of which Michigan Consolidated Gas Company now serves, and the nature and extent of their service is as follows:

In Wayne County, the Consumers Power Company supplies natural gas to Plymouth, a town of about 5,000 population, and to Northville, a town of about 3,000 population on the line between Oakland and Wayne Counties.

In Washtenaw County, the City of Ypsilanti, through its gas department, supplies manufactured gas to that community. Its population at last census was about 12,000.

In Mecosta County, Northland Natural Gas Corporation supplies the village of Barryton (population 342) from local natural gas fields.

In Ionia County, Consumers Power Company distributes natural gas in Ionia; population about 6,000.

[fol. 407] In Montcalm County, Consumers Power Company distributes natural gas in Edmore, population about 825. E. C. Daily distributes natural gas in McBride and Sheridan, two small towns, the population of the latter being about 542. Under name of Stanton Gas Company, Mr. Daily serves natural gas in Stanton, population about 900.

In Muskegon County, the West Michigan Consumers Gas Company supplies natural gas to certain industries in the Greater Muskegon area. Its gas is believed to be obtained from local fields, casinghead production from oil wells, and still gases from oil refineries in the Muskegon area.

Within Iowa other gas companies rendering service in counties in which applicant proposes to render service are the Council Bluffs Gas Company now serving natural gas in Council Bluffs (population 41,439), Pottawattamie County, and the Iowa Electric Company serving natural gas in Atlantic (population 5,802), in Cass County.

Such other service, not within counties in which applicant proposes to serve but within reasonable distance of applicant's pipe line, may be by any of the following gas companies:

Iowa Electric Light & Power Company now serves manufactured gas in Boone, Boone County, Iowa, population 12,373, and natural gas in Ames, Story County, Iowa, population 12,555, and Nevada, Story County, Iowa, population 3,353.

Iowa Electric Company now serves natural gas in Muscatine, Muscatine County, Iowa, population 18,286.

Interstate Power Company now serves manufactured gas in Clinton, Clinton County, Iowa, population 26,270.

Wisconsin Southern Gas Company now serves manufactured gas in Burlington and vicinity, Racine County, Wisconsin, population 20,555.

Illinois Power Company now serves manufactured gas in La Salle and Peru and vicinity, La Salle County, Illinois, combined population 31,220.

Northern Indiana Public Service Company now serves [fol. 408] manufactured gas and a considerable amount of natural gas in a group of cities and towns in Lake, Porter, La Porte, Elkhart and St. Joseph Counties, Indiana, including Hammond, Gary, Michigan City, La Porte, South Bend and Elkhart. Population served is approximately 370,000.

National Utilities Company of Michigan now serves manufactured gas in St. Joseph and Benton Harbor, Berrien County, Michigan, population 26,000, in South Haven, Van Buren County, Michigan, population 4,745, in Grand Haven, Ottawa County, Michigan, population 8,790.

Michigan Gas & Electric Company now serves manufactured gas in Holland, Ottawa County, Michigan, population 14,616.

(2) With respect to such other service applicant has made no survey by which it could determine the adequacy of the present service, the available supply of gas or the public need for further service. As to the potential market in such communities which could be served economically through the proposed facilities applicant states that in all the communities mentioned which are served with manufactured gas there is a potential market for natural gas.

(E) A description of the facilities proposed to be constructed, acquired, or operated, giving, in so far as *such* information may be pertinent, the size, capacity, length and location of gathering lines, transmission lines and laterals; the extent of distribution systems; the location, rated horsepower and capacity of all compressor stations; the location and description of other important property units; a description of the proposed manner or method of operating said proposed facilities, including proposed operating pressures, the capacity of the proposed facilities, estimates of maximum and minimum day demands, and any other pertinent facts showing that such facilities will be capable of performing adequately the services which applicant proposes to render. In connection herewith the applicant shall furnish:

(1) A sketch map delineating the size and location of applicant's proposed pipe lines, the communities to be served, the points of connection with existing facilities and the location of any gas fields representing a new source of [fol. 409] supply to be utilized in connection with the proposed facilities;

(2) A statement setting forth all contracts for the construction, purchase or lease of the proposed facilities and giving the affiliation, if any, between applicant and any other party to said contracts.

The proposed natural gas pipe line will begin at a point

at or near Section 8, Block 1, Public Free School Land Survey, Hansford County, Texas. At this point the pipe line company will purchase from Phillips Petroleum Company its entire requirements of gas, which gas is to be gathered by Phillips and delivered to the pipe line at a pressure of not less than 200 pounds per square inch gauge. At this point will be constructed the initial compressor station of the project, which will be operated at an inlet pressure of not less than 200 pounds per square inch gauge (the initial pressure is expected to be 300 pounds or more per square inch) and a discharge pressure of about 900 pounds per square inch gauge. The pipe line, originating on the discharge side of this compressor station, will be constructed of 26" O.D. electric welded steel pipe of 5/16" wall thickness, the steel having a minimum yield point of 52,000 lbs. per square inch, and will be laid in a substantially straight line in a northeasterly direction (see map) to the site of No. 1 line compressor station, about 110 miles from the initial compressor station. From this point it will continue in a substantially straight line to the site of No. 2 line compressor station, about 110 miles to the northeast. The line will then continue in a general northeasterly direction, about 111 miles, to the site of No. 3 line compressor station, avoiding the Smoky Hill River. From the site of No. 3 line compressor station it will continue in a northeasterly direction crossing the Kansas River by means of a suspended aerial crossing, then bending slightly northward toward the selected Missouri River crossing near Rulo, Nebraska, where a suspended aerial crossing will be used. From this point the line will tend northeasterly to the site of No. 4 line compressor station, approximately 111 miles from No. 3 station, and thence to a point about 6 miles north and slightly west of Chariton, Iowa, where the 5/16" wall 26" [fol. 410] O.D. pipe will terminate. From this point, the line will be constructed of 26" O.D. 1/4" wall steel pipe of the same specifications and will continue in a substantially straight line to the Mississippi River near Peasant Valley, Iowa, at which point the river will be crossed by means of a suspended aerial crossing. The site of No. 5 line compressor station will be southeast of Oskaloosa, Iowa, approximately 162 miles from No. 4 station. No. 6 line compressor station will be near the Mississippi River crossing, approximately 105 miles from the site of No. 5 station. After crossing the Mississippi River the line will run ap-

proximately east to the west bank of the Fox River in Kendall County, Illinois, approximately 107 miles at which point will be located No. 7 line compressor station. In the section of line constructed of 26" O.D. ¼" wall steel pipe the maximum operating pressure will be 720 pounds per square inch gauge.

On the discharge side of No. 7 line compressor station the size of the pipe line will be reduced to 22" O.D. ¼" wall thickness electric weld steel pipe of 52,000 lbs. per square inch minimum yield point, and will be operated at a maximum pressure of 844 lbs. per square inch gauge. Crossing the Fox River by means of an aerial crossing, it will extend in a direction somewhat south of east to the Illinois River downstream from Joliet, Illinois, where it will cross the Illinois River by an aerial crossing, and thence approximately due east, south of the Chicago industrial area around the tip of Lake Michigan, where it will swing northeastward to about the Indiana-Michigan state line. At about this point approximately 106 miles from No. 7 line compressor station, No. 8 line compressor station will be located. The line will then extend north northeast in as nearly a straight line as possible approximately 154 miles to the Austin storage field located near Big Rapids, Michigan, which will be the terminus of the initial construction.

From No. 7 line compressor station a 20" line will be constructed running in a direction slightly east of north to the Illinois-Wisconsin state line. From this point there will be constructed two lines, one an 18" line running northeasterly to the point of delivery to the Milwaukee area, the other an 8" line running in a northwesterly direction to the point of delivery to the Madison area. The [fol. 441] location and size of laterals and branch lines are shown on the sketch map, Exhibit III.

At first applicant will construct and operate only the initial compressor station near Section 8, Block 1, Public Free School Land Survey, Hanford County, Texas. The line compressor stations will be added from year to year as the load develops. It is not contemplated that applicant will construct or operate any distribution systems.

Michigan Consolidated Gas Company will construct, or cause to be constructed, a 26" O.D. ¼" wall thickness electric welded steel pipe line between the Austin storage field and a point near the city limits of Detroit, Michigan, approximately 140 miles in length, and a 24" O.D. ¼" wall

thickness electric welded pipe line between the Austin storage field and the Reed City field. It will also construct a compressor station at the Austin storage field. At such time as applicant is permitted to supply the full requirements of Michigan Consolidated Gas Company, it will purchase from that company the storage fields and gathering lines in Michigan together with the transmission mains used to deliver natural gas to the city gates of Michigan Consolidated's distribution properties, and will thereafter deliver such requirements at the various city gates. This purchase will be of great economic importance in the operation of applicant's projected pipe line. Following completion of the project and pending the acquisition of the Michigan facilities by applicant, such facilities will be operated by applicant pursuant to its agreement with Michigan Consolidated.

Exhibit II attached hereto shows in tabulated form the sizes of pipe, both O.D. and I.D., to be used between the main line points, the distance between these points in miles, the estimated loads on both the day of maximum sales and day of minimum sales and the calculated upstream and downstream pressures when handling these loads for the first five years. This exhibit also shows pertinent data relative to all compressor stations required for each year.

(1) A sketch map showing the proposed project is attached hereto, marked Exhibit III.

(2) There are no contracts for the construction, pur- [fol. 412] chase or lease of the proposed facilities, other than the above mentioned contract between applicant and Michigan Consolidated Gas Company.

(F) A statement of the gas reserves which are to supply the market which is proposed to be served, and an estimate of their expected life in years.

The gas reserves which will supply the market proposed to be served are estimated to be not less than three trillion cubic feet. They are owned or controlled by Phillips Petroleum Company and are located in the Hugoton-Panhandle fields in Texas and Oklahoma. They are ample to supply the requirements of the pipe line for at least thirty years. The gas will be gathered and processed by Phillips Petroleum Company and sold to applicant, the contractual arrangements between Phillips and applicant being subject

to the ultimate grant of a certificate of public convenience and necessity. There is no affiliation between applicant and Phillips Petroleum Company.

(G) A statement setting forth all facts bearing upon economic feasibility, including:

(1) The estimated total overall capital cost of the proposed extension or acquisition, including all expenditures involved in the construction or acquisition of the proposed facilities, proposed costs of financing, franchises, working capital, and other incidental costs, with a brief statement of applicant's proposed plan of financing.

(2) A detailed statement of the extent to which such plan is supported by firm or contingent commitments from all financial sources, including commitments from banks, trust companies, insurance companies, investment bankers, steel companies, pipe line supply companies, or other sources.

(3) A statement showing estimates of (a) total revenues expected from the proposed new facilities to be constructed, acquired or operated, (b) total fixed charges, (c) total operating expenses.

(4) A general statement covering the rates proposed to be charged by applicant for each kind of natural gas service proposed to be rendered, and the expected sales, revenues, [fol. 413] average revenue per Mcf and average revenue per therm, to be derived therefrom.

(1) The total overall capital cost of the initial construction for the project is estimated to be $49,000,000, which includes $1,500,000 for working capital. No amount is included for cost of financing.

It is estimated that additional construction and capital costs during the first four years of operation, will be as follows: 1948, $849,738; 1949, $652,478; 1950, $1,653,955; 1951, $17,951,198. Such additions will provide the necessary capacity for furnishing the full natural gas requirements of Michigan Consolidated Gas Company beginning with the year 1952 and include the purchase from Michigan Consolidated Gas Company of the storage fields, gathering system and transmission mains, compressor station and the 26" transmission line to be constructed between the Austin field and Detroit, the total estimated cost of the completed proj-

ect being $70,000,000. Details of this estimate are shown in Exhibit IV.

It is contemplated that American Light & Traction Company will transfer the $5,000 par value initial stock of applicant to Michigan Consolidated Gas Company as a contribution to paid-in surplus and that the latter will provide applicant with $15,000,000 of equity capital, taking common capital stock at par therefor. Applicant will market $28,000,000 of first mortgage 3½% bonds and $6,000,000 of 2%, one to five year Serial Notes which it is believed can be sold at par. Such additional funds as may be needed in 1951 will be provided by sale of securities to the public.

(2) There are no express commitments from bankers, underwriters or others, with respect to the marketing of the proposed first mortgage bonds or serial notes. Inquiries have been made as to the marketability of such securities and bankers in both New York and Chicago have advised that the securities should find a ready market.

(3) Exhibit V shows estimates of total revenues expected from the proposed pipe line, total operating expenses and total fixed charges. A detailed statement of the total operating expenses is shown on Exhibit VI.

[fol. 414] (4) Applicant, in the sale of natural gas, proposes to use a block rate, which, while affording higher revenue per Mcf during the development period encourages additional sales by lower charges as sales increase.

The rate proposed is as follows:

For the first 400 Mcf per month per 1,000 population the rate shall be $.25 per Mcf.

For the next 600 Mcf per month per 1,000 population the rate shall be $.20 per Mcf.

For all gas in excess of 1,000 Mcf per month per 1,000 population the rate shall be $.15 per Mcf.

For controllable load, ordinarily referred to as interruptible or off-peak sales, a rate of $.12 per Mcf is proposed.

Since there may be a four year interim period before the full requirements of Detroit and Ann Arbor will be supplied by applicant, it is proposed that the gas requirements of Michigan Consolidated Gas Company be supplied on an interruptible basis at the Austin field, the rate to be twelve cents per Mcf in addition to a charge of $975,000 per year, a sum approximately 12½% (fixed charges) on the cost

of the 22" line from Wisconsin Junction to Austin field. Under this temporary method of operation, the Michigan Consolidated Gas Company will purchase gas to carry its peak requirements during the winter season for approximately 22½ cents per Mcf during the first year of operation. This will gradually decrease to approximately 18 cents during the fourth year of operation. These prices are much below the price paid for gas under present methods of operation and in addition, permit the immediate further development of the business within the districts served.

When the full requirements of Michigan Consolidated Gas Company are supplied by applicant, natural gas will be delivered at the city gates at the same rate as all other cities supplied by the pipe line.

Exhibit VII, pages 1 and 2, shows the estimated total sales to each of the communities to be served and also the estimated maximum daily demand of each for the first five years of service. These sales are summarized by classes [fol. 415] on page 3 of the Exhibit, while page 4 shows a summary of revenues by classes and the revenues per Mcf and per therm.

(H) A general description of the proposed method of supervising the operation of the proposed project, including reference to any relevant service or management contracts, existing or contemplated.

The proposed pipe line will be operated and supervised independently by its own directors and officers. No service or management contracts are contemplated.

(I) Not applicable.

(J) A statement of any other facts and circumstances upon which applicant relies to establish that present or future public convenience and necessity require the new construction, acquisition or operation of such facilities.

This project originated through necessity

(1) of procuring such a supply of natural gas as would permit Michigan Consolidated Gas Company to continue to serve natural gas throughout the Detroit and Ann Arbor Districts and to meet not only the present demand but the rapidly growing future demand of the great metropolitan area for natural gas service;

(2) of procuring an adequate supply of natural gas to serve the districts in western Michigan served by Michigan

Consolidated Gas Company when and as the Michigan gas fields become depleted, as well as a reasonably immediate supply to meet peak loads as the ability of these fields to produce diminishes;

(3) of providing natural gas for distribution in Milwaukee and Madison, Wisconsin, served by Milwaukee Gas Light Company and Madison Gas and Electric Company, respectively, in response to both public demand and economic necessity;

(4) of lowering the burden conventionally placed upon gas taken at a poor load factor so that the public can enjoy gate rates sufficiently low to place the advantages of natural gas for house-heating within the reach of all, and at the same time

[fol. 416] (5) to strengthen the financial position and future prospects of the operating subsidiaries, prior to the dissolution of American Light & Traction Company, so that they might, standing alone, be able to render the full measure of service needed by the communities which they serve and to earn a commensurate return for their stockholders.

Michigan Consolidated Gas Company (formerly Detroit City Gas Company) began the distribution of natural gas in 1936, its supply having been obtained under contract with Panhandle Eastern Pipe Line Company. After its introduction, sales rapidly increased and from time to time the increasing demand was met by increased contractual quantities until in June, 1940, Panhandle Eastern Pipe Line Company agreed to furnish a maximum of 125,000,000 cubic feet per day. Nearly five years have elapsed during which the demand in the area has greatly increased and a heavy potential demand must soon be provided for. Notwithstanding this, the pipe line has repeatedly and continuously refused to increase the maximum daily delivery, although possessed of additional capacity which it has seen fit to sell to other and later customers at substantially equal prices. Michigan Consolidated Gas Company has no other source from which it can obtain natural gas and is unable to provide a substitute at any reasonable cost. It is and will be unable to perform its full duty to the public which it serves without large additional amounts of natural gas and it is now faced with the necessity of procuring its own supply or

of depriving some part or all of the great metropolitan area of natural gas service. In the public interest, the project is one of extreme necessity.

In addition to this, Michigan Consolidated Gas Company is faced with the necessity of procuring a large supply of natural gas for distribution in the western districts served by it because of the rapid depletion of the Michigan gas fields from which they now derive their supply.

Conservative estimates of the demand which will be placed upon Michigan Consolidated Gas Company in 1952, the fifth year of operation of the proposed pipe line, indicate a maximum day's delivery of approximately 370,000 Mcf which includes an estimated maximum day's delivery [fol. 417] at Detroit of approximately 297,000 Mcf. The latter figure is more than two and a quarter times the contractual supply of 125,000 Mcf and Panhandle Eastern Pipe Line Company has arbitrarily refused to serve more. The estimate of the maximum day's delivery of the entire project for 1952 is more than 630,000 Mcf. These estimates indicate annual sales in 1952 of approximately forty-three billion cubic feet in the Detroit District, fifty-seven billion for Michigan Consolidated Gas Company in all of the area served, and an aggregate of one hundred five billion for the proposed pipe line. Furthermore, the estimated deliveries for 1952, the fifth year of operation, include sixteen billion cubic feet for interruptible gas sales. This will allow for further line expansion by the substitution of firm gas sales for these interruptible gas sales.

The project is one which radically departs from the conventional design of existing transcontinental natural gas pipe lines, in that it makes use of and will be operated in connection with the Austin gas storage field in Michigan now owned by Michigan Consolidated Gas Company and certain other Michigan fields now available and adaptable for conversion to storage use. The ultimate plan contemplates the storage of a minimum of 13 billion cubic feet of gas in the underground storage fields. Thus a large supply of gas is available which can be delivered from either end of the line in case of pipe line failure, providing the same safety from accidental failure of supply that would ordinarily be provided by two lines. The plan further provides for maximum daily deliveries which, except for the use of storage fields, would require approximately double the investment in pipe line and compressor station facilities.

The maximum of capacity and safety is thus provided at a minimum of cost.

The plan contemplates a single large diameter pipe line to be constructed of electric weld steel pipe of the highest yield point yet commercially available, permitting lighter-wall pipe to be used at high operating pressure. The line will have a capacity of 320,000,000 cubic feet per day when fully powered and, when operated in conjunction with the storage reservoir, can maintain a delivery of substantially 100% of its capacity daily, the gas being put into storage in Michigan on all days when the line capacity exceeds the [fol. 418] requirements. When requirements exceed the line's capacity out of Hugoton, gas will be taken from storage. Thus the pipe line as designed can make maximum daily deliveries in excess of 630,000,000 cubic feet and yearly deliveries in excess of one hundred billion cubic feet, and can serve markets requiring maximum daily demands more than double the actual pipe line capacity provided.

Such an installation produces very low unit operating costs and obviates the necessity of selling natural gas at dump prices for boiler fuel and other interruptible uses in which coal fuel might serve equally well in order to obtain a high operating load factor.

In the area which the project will serve the sale of space heating has never been solicited or developed. Until the commencement of World War II, when restrictions were placed upon any further expansion of house-heating business by utilities serving natural gas, the rate schedules of the existing long distance pipe lines were such that house and commercial space heating were discouraged and highly penalized by reason of their low load factor. Applicant believes that the use of natural gas for domestic and commercial space heating is a great public convenience and should be promoted, and, since it is economically feasible only by a pipe line designed and operated in conjunction with storage reservoirs at or near the terminus of the line, applicant has availed itself of such storage reservoirs and proposes to offer the service at such lowered cost as will make possible its universal use in the areas served. It is a service which has heretofore been denied the public except at rates which prohibited its use to many, and this project has been especially designed to eliminate the additional cost of poor load factor gas, which has been the greatest deterrent to the widespread use of natural gas for househeating

in communities located at a great distance from the source of supply.

The result of the plan is that the communities which may be served by the line will be provided adequate gas for all requirements, including the heating of homes and commercial establishments, with wholesale city *gate* rates well below those normally required by pipe lines of this length and, at [fols. 419-420] the same time, conserve the natural gas supply by reducing sales normally made by pipe lines for boiler fuel and other uses where solid fuel would serve equally well.

* * * * * * * *

Wherever volumes of gas are mentioned herein such volumes are computed at a base pressure of 14.736 pounds per square inch absolute and at a temperature of 60° F.

* * * * * * *

Wherefore, applicant prays that it be granted a certificate of public convenience and necessity to authorize its construction and operation of the proposed natural gas pipe line extending from the Hugoton-Panhandle Fields in Texas to a point of distribution near the Austin Field in Mecosta County, Michigan; to operate the Austin Field and pipe lines and other facilities appurtenant thereto, owned by Michigan Consolidated Gas Company, and to operate the proposed pipe line extending from the Austin Field to Detroit; and to acquire and continue to operate such facilities, and to serve markets in Missouri, Iowa, Illinois, Wisconsin, Indiana and Michigan, all in accordance with plans as herein set forth.

Michigan-Wisconsin Pipe Line Company, by Henry Frink, Vice President. Address: 415 Clifford Street, Detroit 26, Michigan.

Donald R. Richberg, Address: Fourth Floor, Bowen Building, 815 Fifteenth Street, N. W., Washington, D. C.; Park Chamberlain, Address: 3224 Bankers Building, 105 West Adams Street, Chicago 3, Illinois; Carl I. Wheat, Robert E. May, Address: 520 Shoreham Building, Washington 5, D. C., Attorneys for Applicant.

[Verified.]

[All exhibits to the foregoing application with the exceptions of exhibits I and III, omitted by stipulation of the parties.]

[fol. 421–422]

EXHIBIT 1 TO PLAINTIFF'S EXHIBIT 2—Page 1

Michigan-Wisconsin Pipe Line Company

List of Communities Proposed to be Served Presently and Within the Next Five Years

City or Town	County	State	Population	Distributor	Kind of Gas	Source of Natural Gas
Detroit	Wayne	Michigan	*2,295,000	Michigan Consolidated Gas Co.	Natural & Mfd.	Panhandle Eastern Pipe Line Co.
Milwaukee	Milwaukee	Wisconsin	* 790,000	Milwaukee Gas Light Co.	Manufactured	—
Grand Rapids	Kent	Michigan	* 240,000	Michigan Consolidated Gas Co.	Natural	Michigan Gas Fields
Des Moines	Polk	Iowa	159,819	Iowa Power and Light Co.	Mixed	Northern Natural Gas Co.
Moline & Rock Island	Rock Island	Illinois	93,942	Iowa-Illinois Gas & Elec. Co.	Natural	Natural Gas Pipeline Co. of America
Madison	Dane	Wisconsin	* 71,557	Madison Gas & Elec. Co.	Manufactured	—
Muskegon	Muskegon	Michigan	* 110,000	Michigan Consolidated Gas Co.	Natural	Michigan Gas Fields
Davenport	Scott	Iowa	66,039	Iowa-Illinois Gas & Elec. Co.	Natural	Natural Gas Pipeline Co. of America
Cedar Rapids	Linn	Iowa	* 66,841	Iowa-Illinois Gas & Elec. Co.	Natural	Natural Gas Pipeline Co. of America
Ottumwa	Wapello	Iowa	31,570	Iowa-Illinois Gas & Elec. Co.	Natural	Natural Gas Pipeline Co. of America
Ann Arbor	Washtenaw	Michigan	* 57,000	Michigan Consolidated Gas Co.	Natural	Panhandle Eastern Pipe Line Co.
Fort Dodge	Webster	Iowa	22,904	Iowa-Illinois Gas & Elec. Co.	Natural	Northern Natural Gas Co.
Iowa City	Johnson	Iowa	17,172	Iowa-Illinois Gas & Elec. Co.	Natural	Natural Gas Pipeline Co. of America
Oskaloosa	Mahaska	Iowa	11,024	Iowa Power and Light Co.	Natural	Natural Gas Pipeline Co. of America
Greenville & Belding	Montcalm & Ionia	Michigan	* 9,300	Michigan Consolidated Gas Co.	Natural	Michigan Gas Fields
Shenandoah	Page	Iowa	6,846	Iowa Power and Light Co.	Natural	Natural Gas Pipeline Co. of America
Red Oak	Montgomery	Iowa	5,763	Iowa Power and Light Co.	Natural	Natural Gas Pipeline Co. of America
Maryville	Nodaway	Missouri	5,700	Maryville Elec. Lt. & Pr. Co.	Manufactured	—
Mt. Pleasant	Isabella	Michigan	* 10,511	Michigan Consolidated Gas Co.	Natural	Michigan Gas Fields
Big Rapids	Mecosta	Michigan	5,000	Michigan Consolidated Gas Co.	Natural	Michigan Gas Fields
Indianola	Warren	Iowa	4,143	Iowa Power and Light Co.	Natural	Natural Gas Pipeline Co. of America
Winterset	Madison	Iowa	3,631	Iowa Power and Light Co.	Natural	Natural Gas Pipeline Co. of America
Avoca	Pottawattamie	Iowa	1,598	Iowa Power and Light Co.	Natural	Northern Natural Gas Co.
Oakland	Pottawattamie	Iowa	1,317	Iowa Power and Light Co.	Natural	Northern Natural Gas Co.
Griswold	Cass	Iowa	1,132	Iowa Power and Light Co.	Natural	Northern Natural Gas Co.
Walnut	Pottawattamie	Iowa	902	Iowa Power and Light Co.	Natural	Northern Natural Gas Co.
Carson	Pottawattamie	Iowa	613	Iowa Power and Light Co.	Natural	Northern Natural Gas Co.
Sub-Total			4,089,324			

Note: All of the above distributors are subsidiaries of or are companies affiliated with American Light & Traction Company.

* Population of district supplied.

A

's EXHIBIT 2—Page 1

Pipe Line Company

Presently and Within the Next Five Years

r	Kind of Gas	Source of Natural Gas
Consolidated Gas Co.	Natural & Mfd.	Panhandle Eastern Pipe Line Co.
e Gas Light Co.	Manufactured	—
Consolidated Gas Co.	Natural	Michigan Gas Fields
er and Light Co.	Mixed	Northern Natural Gas Co.
ois Gas & Elec. Co.	Natural	Natural Gas Pipeline Co. of America
Gas & Elec. Co.	Manufactured	—
Consolidated Gas Co.	Natural	Michigan Gas Fields
ois Gas & Elec. Co.	Natural	Natural Gas Pipeline Co. of America
ois Gas & Elec. Co.	Natural	Natural Gas Pipeline Co. of America
ois Gas & Elec. Co.	Natural	Natural Gas Pipeline Co. of America
Consolidated Gas Co.	Natural	Panhandle Eastern Pipe Line Co.
ois Gas & Elec. Co.	Natural	Northern Natural Gas Co.
ois Gas & Elec. Co.	Natural	Natural Gas Pipeline Co. of America
er and Light Co.	Natural	Natural Gas Pipeline Co. of America
Consolidated Gas Co.	Natural	Michigan Gas Fields
er and Light Co.	Natural	Natural Gas Pipeline Co. of America
er and Light Co.	Natural	Natural Gas Pipeline Co. of America
Elec. Lt. & Pr. Co.	Manufactured	—
Consolidated Gas Co.	Natural	Michigan Gas Fields
Consolidated Gas Co.	Natural	Michigan Gas Fields
er and Light Co.	Natural	Natural Gas Pipeline Co. of America
er and Light Co.	Natural	Natural Gas Pipeline Co. of America
er and Light Co.	Natural	Northern Natural Gas Co.
er and Light Co.	Natural	Northern Natural Gas Co.
er and Light Co.	Natural	Northern Natural Gas Co.
er and Light Co.	Natural	Northern Natural Gas Co.
er and Light Co.	Natural	Northern Natural Gas Co.

[fol. 423-424]

EXHIBIT I TO PLAINTIFF'S EXHIBIT 2—Page 2

Michigan-Wisconsin Pipe Line Company

List of Communities Proposed to be Served Presently and Within the Next Five Years

City or Town	County	State	Population	Distributor	Kind of Gas	Source of Natural Gas
Racine	Racine	Wisconsin	* 250,000	Wisconsin Power & Light Co.	Manufactured	—
Waterloo	Blackhawk	Iowa	51,143	Iowa Public Service Co.	Manufactured	—
Burlington	Des Moines	Iowa	25,832	Iowa Southern Utilities	Manufactured	—
Beloit	Rock	Wisconsin	25,365	Wisconsin Power & Light Co.	Manufactured	—
Janesville	Rock	Wisconsin	22,992	Wisconsin Power & Light Co.	Manufactured	—
Marshalltown	Marshall	Iowa	19,240	Iowa Electric Light & Pr. Co.	Manufactured	—
Keokuk	Lee	Iowa	15,073	Iowa Union Electric Co.	Manufactured	—
Ft. Madison	Lee	Iowa	14,063	Ft. Madison Gas Light Co.	Manufactured	—
Newton	Jasper	Iowa	10,464	City of Newton	Manufactured	—
Cedar Falls	Blackhawk	Iowa	9,349	City of Cedar Falls	Manufactured	—
Centerville	Appanoose	Iowa	8,413	Iowa Southern Utilities Co.	Manufactured	—
Creston	Union	Iowa	8,033	Central States Elec. Co.	Manufactured	—
Webster City	Hamilton	Iowa	6,738	City of Webster City	Manufactured	—
Chariton	Lucas	Iowa	5,754	Central States Elec. Co.	Manufactured	—
Washington	Washington	Iowa	5,287	Iowa So. Utilities Co.	Manufactured	—
Grinnell	Poweshiek	Iowa	5,213	Iowa So. Utilities Co.	Manufactured	—
Albia	Monroe	Iowa	5,154	Albia Lt. & Ry. Co.	Manufactured	—
Clarinda	Page	Iowa	4,905	Central States Elec. Co.	Manufactured	—
Tama & Toledo	Tama	Iowa	4,905	None	None	—
Mt. Pleasant	Henry	Iowa	4,610	Iowa Southern Utilities Co.	Manufactured	—
Osceola	Clarke	Iowa	3,281	Iowa Southern Utilities Co.	Manufcatured	—
Colfax	Jasper	Iowa	2,252	None	None	—
Corning	Adams	Iowa	2,162	None	None	—
Bedford	Taylor	Iowa	2,151	None	None	—
Villisca	Montgomery	Iowa	2,011	None	None	—
Mt. Ayr	Ringgold	Iowa	1,930	None	None	—
Mystic	Appanoose	Iowa	1,884	None	None	—
Sub-Total			518,204			
Grand Total			4,610,731			

Per Cent of Total Population offered service which is now served by distributors who are subsidiaries of American Light & Traction Co. or affiliated companies—88.8.

* Population of district supplied.

NEBRASKA

KANSAS

OKLAHOMA

TEXAS

COLORADO

NEW MEXICO

NEW MEXICO

N

Dodge City

Dodge City

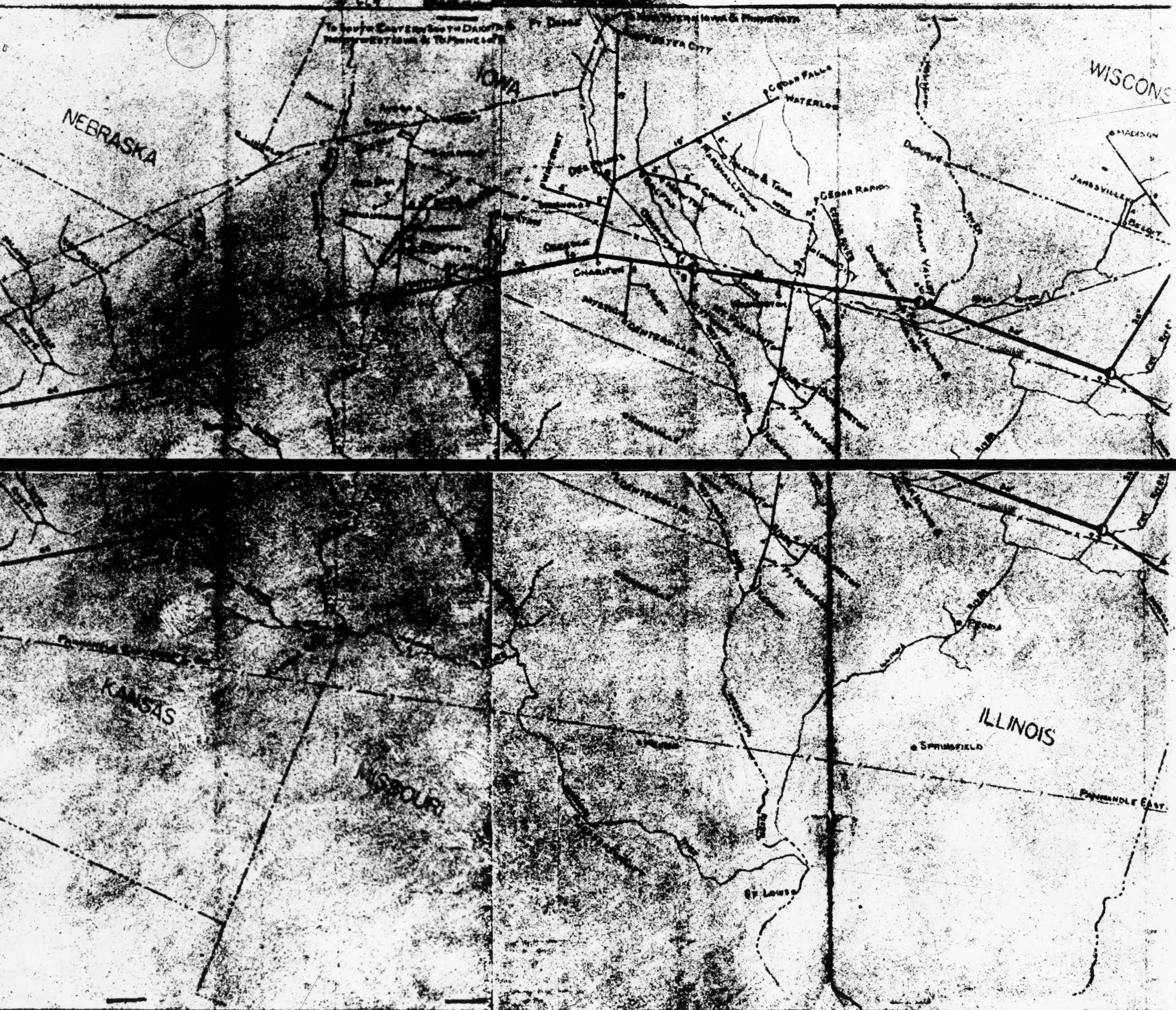
Oklahoma City

Amarillo

River

River

River


NEBRASKA
IOWA
Ft Dodge
Webster City
Cedar Falls
Waterloo
Des Moines
Marshalltown
Grinnell
Newton & Tama
Cedar Rapids
Clinton
Chariton
Ft Madison
Dubuque
Madison
Janesville
DeKalb
Pleasant Valley
WISCONSIN
KANSAS
MISSOURI
Peoria
ILLINOIS
Springfield
St Louis
Panhandle East.

(392C) 425 = 426

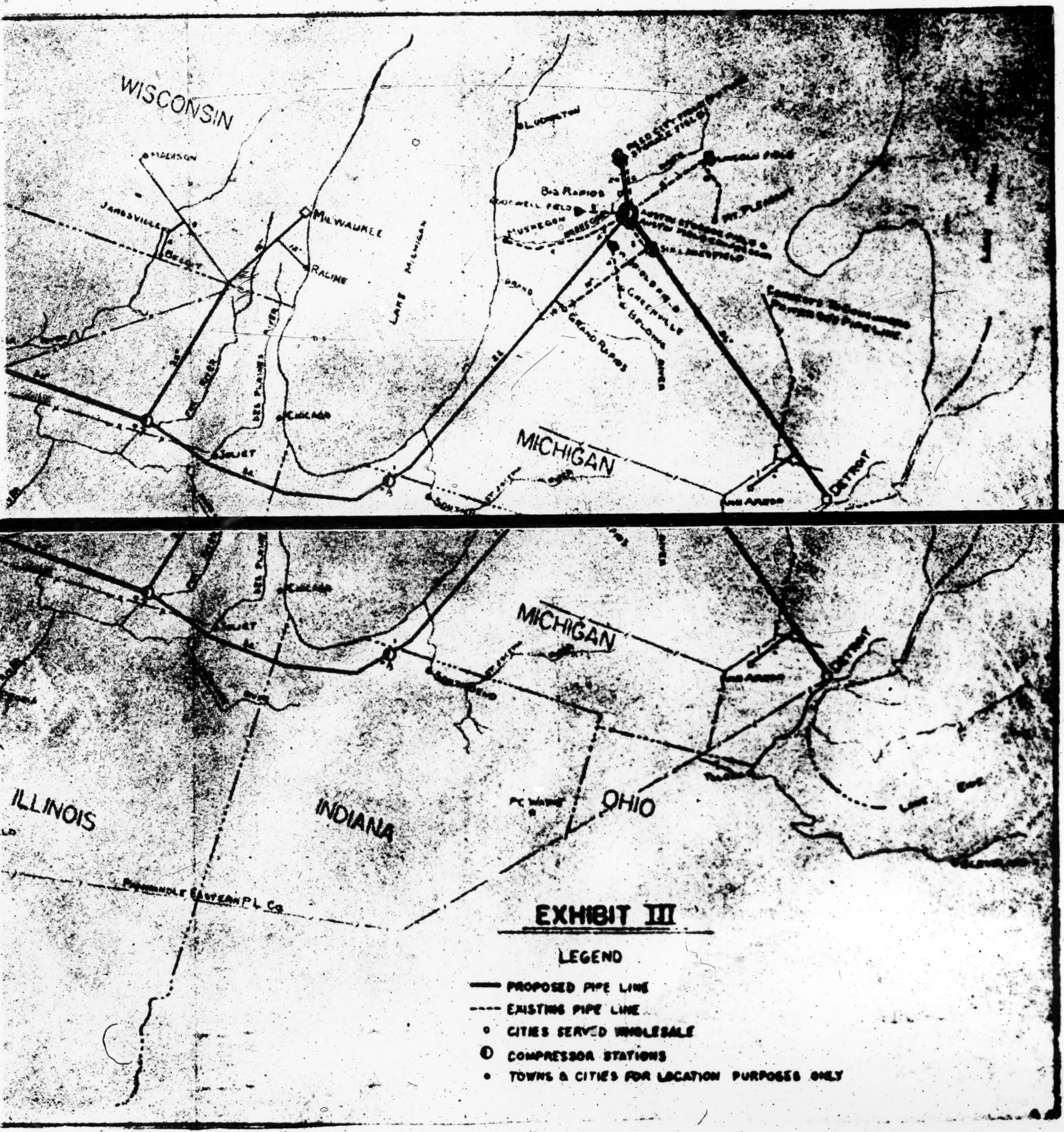


EXHIBIT III

LEGEND

- PROPOSED PIPE LINE
- EXISTING PIPE LINE
- CITIES SERVED WHOLESALE
- COMPRESSOR STATIONS
- TOWNS & CITIES FOR LOCATION PURPOSES ONLY

[fol. 427] PLAINTIFF'S EXHIBIT 3.

BEFORE THE FEDERAL POWER COMMISSION

Docket No. G-669

In the Matter of MICHIGAN-WISCONSIN PIPE LINE COMPANY

Amendment to Application for a Certificate of Public Convenience and Necessity.

Received. March 13, 1946. Federal Power Commission.

Comes now Michigan-Wisconsin Pipe Line Company, Applicant in the above-entitled proceeding, and prays leave to amend its application, filed with the Commission on September 24, 1945, in order principally to add to the communities proposed to be served certain cities and towns located in the State of Wisconsin, and to eliminate from the area proposed to be served certain other cities and towns located in the state of Iowa. The specific amendments follow:

Amend the list of cities and towns shown under Item (D) on Page 4 of the application to include the following additional cities and towns, and the municipalities contiguous thereto, in the State of Wisconsin:

Green Bay	Fond du Lac
Sheboygan	Manitowoc
Appleton	Two Rivers.
Oshkosh	

Amend the list of cities and towns shown under Item (D) on Page 4 of the application to eliminate the following cities and towns, and the municipalities contiguous thereto, in the State of Iowa:

Waterloo	Webster City
Marshalltown	Tama
Cedar Falls	Toledo.

Amend Item (D) by inserting an additional paragraph at the bottom of Page 4 reading as follows:

"Applicant does not propose to serve the requirements of the cities and towns of Fort Dodge, Avoca, Oakland, Griswold, Walnut and Carson in the State of Iowa, which

now obtain their natural gas supply from Northern Natural [fol. 428] Gas Company, until after existing contractual commitments expire in the year 1952."

Amend the third paragraph on Page 5 of the application to read as follows:

"It is estimated that the population of the area to be served is approximately 4,792,000."

Amend the first full paragraph on Page 9 of the application to read as follows:

"From No. 7 line compressor station a 22" line will be constructed running in a direction slightly east of north to the Illinois-Wisconsin state line. From this point there will be constructed 20" and 18" lines running northeasterly to the point of delivery to the Milwaukee area; an 8" line to the point of delivery to the Madison area; a 14" line from near the Milwaukee area to lateral lines connecting the cities of Sheboygan, Oshkosh and Fond du Lac, and a 10" line to the area from which laterals will serve the cities of Two Rivers, Manitowoc, Appleton and Green Bay."

Amend the last paragraph on Page 10 of the application to read as follows:

"It is estimated that additional construction and capital costs during the first four years of operation will be approximately as follows: 1948, $1,440,000; 1949, $955,000; 1950, $1,682,000; 1951, $18,103,000. Such additions will provide the necessary capacity for furnishing the full natural gas requirements of Michigan Consolidated Gas Company beginning with the year 1952, and include the purchase from Michigan Consolidated Gas Company of the storage fields, gathering system and transmission mains, compressor station and the 26" transmission line to be constructed between the Austin field and Detroit, the total estimated cost of the completed project being approximately $71,000,000."

Amend the next to the last sentence in the second full paragraph on Page 13 of the application to read as follows:

"Furthermore, the estimated deliveries for 1952, the fifth year of operation, include approximately fourteen billion cubic feet of interruptible gas sales."

[fol. 429] Applicant will offer evidence at the hearing herein which will show the necessary changes in the map and exhibits attached to its application to reflect the alterations in its plans as proposed in this amendment.

Michigan-Wisconsin Pipe Line Company, by Frank L. Conrad, President, Address: 2200 Bankers Building, 105 West Adams Street, Chicago 3, Illinois.

Donald R. Richberg, Address: Fourth Floor, Bowen Building, 815 Ffteenth Street, N. W., Washington, D. C. Park Chamberlain, Address: 3224 Bankers Building, 105 West Adams Street, Chicago 3, Illinois. Carl I. Wheat, Robert E. May, Address: 520 Shoreham Building, Washington 5, D. C., Attorneys for Applicant.

[Verified.]

PLAINTIFF'S EXHIBIT 4

Before the Federal Power Commission

In the Matter of Michigan-Wisconsin Pipe Line Company
Docket No. G-669

Second Amendment to Application for a Certificate of Public Convenience and Necessity

Received, July 22, 1946, Federal Power Commission
Federal Power Commission July 22, 1946. Received.

Comes now Michigan-Wisconsin Pipe Line Company, Applicant in the above-entitled proceeding, and prays leave to amend further its application, filed with the Commission on September 24, 1945, as heretofore amended, in order, principally, to revise the project as shown on the attached map; to eliminate from the markets proposed to be served certain cities and towns located in the States of Iowa and [fol. 430] Illinois; and to offer to serve Consumers Power Company in the State of Michigan. The specific amendments follow:

Eliminate from the list of cities and towns proposed to be served, shown under Item (D) on Page 4 of the Application, as heretofore amended, the cities of Rock Island and Moline in the State of Illinois; and all of the cities and

towns in the State of Iowa, except Mt. Pleasant, Burlington, Ft. Madison and Keokuk, and add to such list the town of Stoughton in the State of Wisconsin, so that the first Paragraph under Item (D) on Page 4 of the Application will read as follows:

"The service proposed to be rendered by the project initially and for the first four years, will consist of supplying Michigan Consolidated Gas Company with all its requirements of natural gas in excess of those supplied under contract by Panhandle Eastern Pipe Line Company, delivered at the Austin gas storage field in Michigan, and the entire natural gas requirements of the following cities and towns, and the municipalities contiguous thereto:

Wisconsin
- Milwaukee
- Racine
- Beloit
- Janesville
- Madison
- Green Bay
- Sheboygan
- Appleton
- Oshkosh
- Fond du Lac
- Manitowoc
- Two Rivers
- Stoughton

Iowa
- Mt. Pleasant
- Burlington
- Ft. Madison
- Keokuk

Missouri
- Maryville"

Add, after the foregoing, at the bottom of Page 4 of the Application, the following Paragraph:

"Applicant is willing to undertake to sell natural gas to Consumers Power Company in such reasonably adequate quantities and at such appropriate delivery point or points, as may be mutually satisfactory, under rates in line with those which Applicant proposes to charge for similar service in Michigan."

Amend the description of the facilities set forth under [fol. 431] Item (E) on Pages 8-10 of the Application, as heretofore amended, to read as follows:

"The proposed natural gas pipe line will begin at a point at or near Section 8, Block 1, Public Free School Land Survey, Hansford County, Texas. At this point the pipe line company will purchase from Phillips Petroleum Company its entire requirements of gas, which gas is to

be gathered by Phillips and delivered to the pipe line at a pressure of not less than 200 pounds per square inch gauge. At this point will be constructed the initial compressor station of the project, which will be operated at an inlet pressure of not less than 200 pounds per square inch gauge (the initial pressure is expected to be 300 pounds or more per square inch) and a discharge pressure of about 720 pounds per square inch gauge. The pipe line, originating on the discharge side of this compressor station, will be constructed of 26" O. D. electric welded steel pipe of ¼" wall thickness, the steel having a minimum yield point of 52,000 pounds per square inch and will extend in a generally northeasterly direction (see map) to the selected Missouri River crossing near Rulo, Nebraska, where a suspended aerial crossing will be used. From this point the line will extend in a substantially straight line northeasterly to the Mississippi River near Pleasant Valley, Iowa, at which point the river will be crossed by means of a suspended aerial crossing. After crossing the Mississippi River, the line will run approximately east to a point near Millbrook, Illinois, generally referred to in this proceeding as the Wisconsin Junction. At this point the size of the pipe line will be reduced to 22" O.D. ¼" wall thickness, electric weld steel pipe of 52,000 pounds per square inch minimum yield point and will be operated at a maximum pressure of 844 pounds per square inch. Crossing the Fox River by means of an aerial crossing, it will extend in a direction somewhat south of east to the Illinois River downstream from Joliet, Illinois, where it will cross the Illinois River by an aerial crossing and thence approximately due east, south of the Chicago industrial area around the top of Lake Michigan, where it will swing northeast to about the Indiana-Michigan state line. The line will then extend northeast in as nearly a straight line as possible approxi- [fol. 432] mately 154 miles to the Austin storage field located near Big Rapids, Michigan, which will be the terminus of the initial construction.

"From the Wisconsin Junction a 22" line will be constructed running in a direction slightly east of north to the Illinois-Wisconsin state line. From this point there will be constructed 22" and 18" lines running northeasterly to the point of delivery to the Milwaukee area; a 10" line to the point of delivery to the Madison area; a 14" line from near the Milwaukee area to lateral lines connecting the cities of

Sheboygan, Oshkosh, Fond du Lac, Two Rivers, Manitowoc and Appleton, and an 8" line to Green Bay."

"At first Applicant will construct and operate only the initial compressor station near Section 8, Block 1, Public Free School Land Survey, Hansford County, Texas, and the station designated on the map as No. 8, located near Mt. Pleasant, Iowa. The line compressor stations will be added from year to year as the load develops. It is not contemplated that Applicant will construct or operate any distribution systems.

"Michigan Consolidated Gas Company will construct, or cause to be constructed, a 26" O.D. 1/4" wall thickness electric welded steel pipe line between the Austin storage field and a point near the city limits of Detroit, Michigan, approximately 140 miles in length, and a 24" O.D. 1/4" wall thickness electric welded pipe line between the Austin storage field and the Reed City field. It will also construct a compressor station at the Austin storage field. At such time as Applicant is permitted to supply the full requirements of Michigan Consolidated Gas Company, it will purchase from that company the storage fields and gathering lines in Michigan, together with the transmission mains used to deliver natural gas to the city gates of Michigan Consolidated's distribution properties, and will thereafter deliver such requirements at the various city gates. This purchase will be of great economic importance in the operation of Applicant's projected pipe line. Following completion of the project and pending the acquisition of the Michigan facilities by Applicant, such facilities will be operated by Applicant pursuant to its agreement with Michigan Consolidated. [fol. 433] "Sketch map showing the proposed project is attached hereto.

"There are no contracts for the construction, purchase or lease of the proposed facilities, other than the above-mentioned contract between Applicant and Michigan Consolidated Gas Company and the contract between Applicant and A. O. Smith Company, covering the purchase of pipe."

Amend the statement of the estimated capital cost, set forth under Item (G) (1) on Pages 10 and 11 of the Application, to read as follows:

"(1) The total overall capital cost of the initial construction for the project is estimated to be $52,618,823, which includes $500,000 for working capital.

No amount is included for cost of financing.

It is estimated that additional construction and capital costs during the first four years of operation will be as follows: 1948, $2,718,541; 1949, $2,627,099; 1950, $955,066; 1951, $25,788,690. Such additions will provide the necessary capacity for furnishing the full natural gas requirements of Michigan Consolidated Gas Company beginning with the year 1952, and include the purchase from Michigan Consolidated Gas Company of the storage fields, gathering system and transmission mains, compressor station and the 26" transmission line to be constructed between the Austin field and Detroit, the total estimated cost of the complete project being $84,708,219.

It is contemplated that American Light & Traction Company will transfer the $5,000 par value initial stock of Applicant to Michigan Consolidated Gas Company as a contribution to paid-in surplus and that the latter will provide Applicant with $17,000,000 of equity capital, taking common capital stock at par therefor. Applicant will market $30,000,000 of first mortgage 3¼% bonds and $5,700,000 of 2% Serial Notes which it is believed can be sold at par. Such additional funds as may be needed in 1951 will be provided by sale of securities to the public.

Amend the statement covering the rates proposed to be charged by Applicant, set forth under Item (G) (4) on [fol. 434] Pages 11 and 12 of the Application, to change the rate to be charged for interruptible gas from $.12 per Mcf to $.14 per Mcf and to change the amount of the annual payment to be made by Michigan Consolidated Gas Company during the interim period from $975,000 to $1,300,000, so that the statement under Item (G) (4) in the Application will read as follows:

"(4) Applicant, in the sale of natural gas, proposes to use a block rate, which, while affording higher revenue per Mcf during the development period encourages additional sales by lower charges as sales increase.

The rate proposed is as follows:

For the first 400 Mcf per month per 1,000 population the rate shall be	$.25 per Mcf
For the next 600 Mcf per month per 1,000 population the rate shall be	.20 per Mcf
For all gas in excess of 1,000 Mcf per month per 1,000 population the rate shall be	.15 per Mcf

For controllable load, ordinarily referred to as interruptible or off-peak sales, a rate of $.14 per Mcf is proposed.

Since there may be a four-year interim period before the full requirements of Detroit and Ann Arbor will be supplied by Applicant, it is proposed that the gas requirements of Michigan Consolidated Gas Company be supplied on an interruptible basis at the Austin field, the rate to be $.14 per Mcf in addition to a charge of $1,300,000 per year, a sum approximately 14½% (fixed charges, depreciation and taxes) on the cost of the 22" from Wisconsin Junction to Austin field. Under this temporary method of operation, the Michigan Consolidated Gas Company will purchase gas to carry its peak requirements during the winter season for approximately $.19 per Mcf during the first year of operation. This will gradually decrease to approximately $.17 during the fourth year of operation. These prices are much below the price paid for gas under present methods of operation and in addition, permit the immediate future development of the business within the districts served.

[fols. 435-436] When the full requirements of Michigan Consolidated Gas Company are supplied by applicant, natural gas will be delivered at the city gates at the same rate as all other cities supplied by the pipe line."

Applicant will undertake promptly to serve on all parties in this proceeding revised exhibits reflecting the changes in the project and in so doing Applicant will indicate which of the exhibits heretofore identified in this proceeding are superseded by reason of this amendment to the application.

Respectfully submitted, Michigan-Wisconsin Pipe Line Company, by Frank L. Conrad, President. Address: 2200 Bankers Building, 105 West Adams Street, Chicago 3, Illinois.

Donald R. Richberg, Address: Fourth Floor, Bowen Building, 815 Fifteenth Street, N. W., Washington, D. C. Park Chamberlain, Address: 3224 Bankers Building, 105 West Adams Street, Chicago 3, Illinois. Carl I. Wheat, Robert E. May, Address: 520 Shoreham Building, Washington 5, D. C., Attorneys for Applicant.

[Verified.]

(Here follows 1 Photolithograph, side folios 437-438)

COLORADO

NEBRASKA

N. MEX

Arkansas River

Republican River

Smoky Hill River

Saline River

Solomon River

Natural Gas Pipe Line Co. of America

Northern Natural Gas Co.

GAS FIELD

MEXICO

HUGOTON GAS FIELD

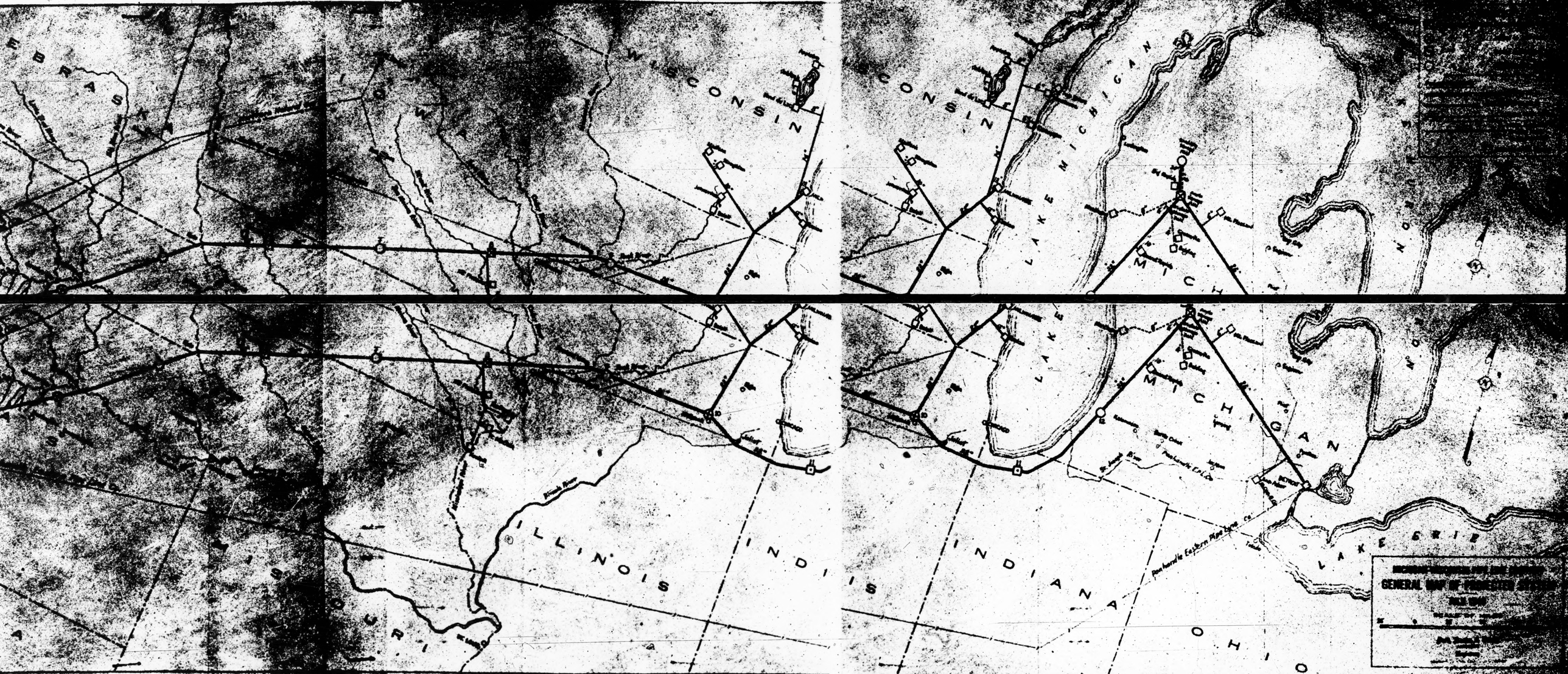
PANHANDLE GAS FIELD

TEXAS

OKLAHOMA

Beaver River

Cimarron River


WISCONSIN
LAKE MICHIGAN
MICHIGAN
ILLINOIS
INDIANA
OHIO
LAKE ERIE

[fol. 439] PLAINTIFF'S EXHIBIT 5

United States of America

Federal Power Commission

I, Leon M. Fuquay, Secretary of the Federal Power Commission and official custodian of the records of said Commission, do hereby certify that the attached six pages are true copies of the Findings and Order Issuing Certificate of Public Convenience and Necessity, entered by the Commission on November 30, 1946, in the matter of Michigan-Wisconsin Pipe Line Company, Docket No. G-669. In witness whereof I have hereunto subscribed my name and caused the seal of the Federal Power Commission to be affixed this 26th day of January A. D., 1948, at Washington, D. C.

Leon M. Fuquay, Secretary.

United States of America. Federal Power Commission

Before Commissioners: Leland Olds, Chairman; Claude L. Draper, Richard Sachse, Nelson Lee Smith and Harrington Wimberly

November 30, 1946.

In the matter of Michigan-Wisconsin Pipe Line Company
Docket No. G-669

Findings and Order Issuing Certificate of Public Convenience and Necessity

Upon consideration of the application, as amended, and the record thereon with respect to the matters involved and the issues presented, the Commission finds that:

(1) Applicant, a Delaware corporation, having its principal office at Wilmington, Delaware, upon completion and operation of the proposed construction hereinafter authorized, will be engaged in the transportation and sale of natural gas in interstate commerce and will thereby become a natural-gas company subject to the jurisdiction of the Commission.

(2) Applicant proposes to serve natural gas in areas within the State of Wisconsin where a substantial demand [fol. 440] for such service exists, no other application for authority to render such service being now before this Commission. Applicant also proposes to add greatly to the supplies of natural gas available for service within the State of Michigan where a demand for such enlarged service has also been demonstrated, no other application for the adequate augmentation of presently available supplies to meet such market requirements being now before this Commission.

(3) Intervenor, Panhandle Eastern Pipe Line Company, has reasonably met its contractual obligations to supply natural gas to Michigan Consolidated Gas Company for resale within its Ann Arbor and Detroit, Michigan, distribution areas and has expressed a willingness to meet the enlarged requirements of said local markets. It is therefore entitled to reasonable protection in the service of these markets and to an opportunity to participate in their growth. Although it has applied for and received in a related case (In the Matter of Panhandle Eastern Pipe Line Company, Docket No. G-706) authority for somewhat enlarged facilities which will enable it to increase to some extent its deliveries to said markets in Michigan, inter alia, it has not applied or sufficient facilities nor demonstrated its ability to serve adequately the needs of these markets in addition to the expanding requirements of those which it enjoys in the other areas which it supplies in Indiana, Illinois and Missouri. Augmentation of the supply of natural gas to the market areas here in question through the facilities proposed to be constructed and operated by Applicant will be in the public interest, provided proper protection and recognition are given to Panhandle's rights and obligations in the said Michigan markets. An appropriate condition should be provided for the purpose.

(4) Applicant has secured substantial reserves of natural gas and has submitted reasonable proof of the financial and economic feasibility of its project in the event of its construction and operation after all necessary approvals and consents shall have been secured. It has not yet obtained, however, all the necessary approvals of operation from the State of Wisconsin and the communities to be served therein or of its proposed financing from the Secu-

rities and Exchange Commission. The authorization herein [fol. 441] granted should be expressly conditioned upon the obtaining of all such necessary consents and approvals, without which the project can be neither financed, constructed nor operated.

(5) Applicant has failed to apply for certain authorizations which, in the opinion of the Commission, are required by the provisions of the Natural Gas Act. Nor are the rate structures which it has submitted satisfactory to the Commission. It has, however, stated its willingness to comply with the requirements of the Natural Gas Act and the rules and regulations of this Commission adopted thereunder. Accordingly the order herein should be conditioned so as to provide Applicant an opportunity to submit appropriate applications and revised rate schedules.

(6) Applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act, as amended, and the requirements, rules, and regulations of the Commission thereunder.

(7) The proposed construction and operation of the facilities by Applicant are required by the public convenience and necessity and a certificate therefor should be issued as hereinafter ordered and conditioned.

(8) It is neither necessary nor appropriate at this time to authorize the construction proposed by Applicant beyond the requirements necessary to permit the commencement of the initial operations as contemplated in the application, as amended, or to authorize the future acquisition by Applicant of facilities some of which are not now in existence and are to be constructed by others.

The Commission, therefore, orders that:

(A) A certificate of public convenience and necessity be and it is hereby issued to Applicant, upon the terms and conditions of this order, authorizing it to:

(1) Construct and operate the following facilities:

(a) A main natural-gas transmission pipeline extending from a point at or near Section 8, Block 1, Public Free School Land Survey, Hansford County, Texas, to its ter-

minus at the Austin Storage Field, located near Big Rapids, [fol. 442] Michigan, and including only the initial compressor station to be located near Section 8, Block 1, Public Free School Land Survey, Hansford County, Texas, and the compressor station designated in the application, as amended, as No. 8, to be located near Mt. Pleasant, Iowa;

(b) The so-called Wisconsin branch natural-gas transmission pipeline;

(c) Lateral natural-gas transmission pipelines and appurtenances necessary to render service as proposed to the communities named in the application, as amended, excepting Mt. Pleasant, Ann Arbor, and Detroit, Michigan;

(2) Operate the existing facilities located in the Austin and Reed City Storage Fields now owned by the Michigan Consolidated Gas Company, and including certain transmission pipelines and metering stations, as described in Schedule A of the contract between Applicant and Michigan Consolidated, dated December 4, 1945;

All as more fully described in the application, as amended, and the exhibits appended thereto;

Provided, however, that said certificate shall not be deemed to authorize Applicant to acquire or operate any facilities owned or to be constructed by others for the transportation or sale of natural gas subject to the jurisdiction of the Commission except as herein or hereafter specifically authorized by the Commission.

(B) This certificate is granted to applicant upon the following terms and conditions:

(i) The facilities herein authorized shall not be used for the transportation to or sale of gas in any community or to any customer other than those named in the application, as amended, except upon specific authorization by this Commission.

(ii) That there shall be no transportation or sales of natural gas, subject to the jurisdiction of the Commission, by means of the facilities herein authorized until all necessary authorizations shall have been obtained from the State of Wisconsin and each of the communities proposed to be served in said state, as specified in the application, as [fol. 443] amended, to the extent and in the manner required

by Sections 196.49 (4a) and 196.58(b) of Chapter 48 of the Statutes of the State of Wisconsin.

(iii) Applicant shall obtain approval of its proposed plan of financings by the Securities and Exchange Commission, and the grant of the certificate herein authorized shall be without prejudice to any action which may be taken by that Commission.

(iv) That the facilities referred to in paragraph (A) (2) above shall not be used for the transportation or sale of natural gas, subject to the jurisdiction of the Commission, except upon the approval by this Commission of an agreement between Applicant and Michigan Consolidated authorizing the lease and operation of such facilities, which said lease agreements shall be filed with the Commission on or before December 16, 1946.

(v) That there shall be no transportation or sale of natural gas, subject to the jurisdiction of the Commission, by means of the facilities herein authorized, unless a proper application for a certificate of public convenience and necessity is filed within fifteen days by the Austin Field Pipeline Company and a certificate is granted by this Commission for the construction and/or operation of facilities necessary to transport the required volumes of gas from the aforementioned Austin and Reed City Storage Fields to the city gates of Mt. Pleasant, Ann Arbor, and Detroit, Michigan, including natural-gas transmission pipe lines extending from the Austin to Reed City Storage Fields and from the Austin Storage Field to the city gates of Mt. Pleasant, Ann Arbor, and Detroit, and additional compressor facilities in the Austin Storage Field.

(vi) That there shall be no transportation or sale of natural gas subject to the jurisdiction of the Commission, by means of the facilities herein authorized, until a proper application for a certificate of public convenience and necessity is filed by the Michigan Consolidated Gas Company for the construction and/or operation of certain necessary additional facilities in the Austin and Reed City Storage Fields.

(vii) The facilities herein authorized shall not be used for [fol. 444] the transportation or sale of natural gas subject to the jurisdiction of the Commission, unless Applicant submits to this Commission within six months after the issuance

of this certificate a schedule of rates and charges in a form satisfactory to this Commission, providing for adequate and reasonable rates and charges consistent with the public interest.

(viii) This certificate is granted upon the express condition that the facilities hereiff authorized shall not be used for the transportation for or sale of gas to the Michigan Consolidated Gas Company for resale in Detroit and Ann Arbor except with due regard to the rights and duties of Panhandle Eastern in its established service for resale in Detroit and Ann Arbor, Michigan, under its presently existing contract with Michigan Consolidated and in accordance with the provisions of the Natural Gas Act; and such rights and duties shall by supplemental order, to be issued within fifteen days from the date of this order, be determined on the basis of:

(1) Panhandle's rights, obligations and service under its Grandfather certificate and subsequent certificates when such certificates were granted by this Commission;

(2) Panhandle's contractual and actual deliveries of natural gas for resale in the years 1942, 1943, 1944, 1945 and 1946;

(3) Panhandle's rights and obligations at the date of termination of the existing contract, on December 31, 1951.

Jurisdiction is specifically reserved by the Commission to reopen these proceedings, if need be, for the purpose of such determination.

(ix) Applicant shall, within fifteen days after the issuance of the supplemental order herein, notify the Commission in writing whether the certificate as herein issued is acceptable to it.

(x) That unless otherwise ordered by the Commission, the construction of the facilities herein authorized shall be commenced not later than January 1, 1948.

[fol. 445] (xi) Applicant shall report to the Commission in writing, under oath, the dates of commencement and completion of the construction of the facilities to which reference is made in paragraph (A) hereof, together with the dates of commencement of operation.

(xii) This certificate is subject to the conditions herein specified and is not transferable, and shall be effective only

so long as Applicant continues the operations hereby authorized in accordance with the provisions of the Natural Gas Act, as amended, and any pertinent order, regulations, or orders heretofore or hereafter issued by this Commission.

(C) For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later.

By the Commission. Chairman Olds and Commissioner Draper dissenting. Supporting and dissenting opinions in this matter will be filed.

Leon M. Fuquay, Secretary.

PLAINTIFF'S EXHIBIT 6

Minutes of the Two Thousand One Hundred and Nineteenth Meeting

Pursuant to call by the Chairman, the Commission convened at 11:15 A. M., on November 30, 1946.

Present: Chairman Olds, Commissioners Draper, Sachse, Smith and Wimberly.

Action was taken, as set forth in the documents appended hereto, in the following matters:

(1) Docket No. G-669, Michigan-Wisconsin Pipe Line Company (Findings and order denying motion of intervener, Panhandle Eastern Pipe Line Company, to dismiss application of Michigan-Wisconsin Pipe Line Company).

(2) Docket No. G-669, Michigan-Wisconsin Pipe Line Company (Findings and order issuing certificate of public [fol. 446] convenience and necessity) (Chairman Olds and Commissioner Draper dissenting. Supporting and dissenting opinions in this matter will be filed).

(3) Docket No. G-706, Panhandle Eastern Pipe Line Company (Findings and order issuing certificate of public convenience and necessity).

Thereupon, the Commission adjourned.

Leland Olds, Chairman.

Attest:
Leon M. Fuquay, Secretary.

United States of America. Federal Power Commission

Before Commissioners: Leland Olds, Chairman; Claude L. Draper, Richard Sachse, Nelson Lee Smith and Harrington Wimberly.

November 30, 1946.

In the matter of Michigan-Wisconsin Pipe Line Company

Docket No. G-669

Findings and Order Denying Motion of Intervener Panhandle Eastern Pipe Line Company to Dismiss Application of Michigan-Wisconsin Pipe Line Company

On November 19, 1946, Panhandle Eastern Pipe Line Company (Panhandle) filed with the Commission a motion to dismiss the application filed by Michigan-Wisconsin Pipe Line Company (Michigan-Wisconsin) in the above entitled Docket No. G-669 contending that: (1) The Commission is without authority under the Natural Gas Act, as amended, to deprive Panhandle of its "grandfather" markets by the issuance of a certificate of public convenience and necessity to Michigan-Wisconsin; (2) the Commission cannot lawfully issue a certificate of public convenience and necessity to Michigan-Wisconsin, since Panhandle is willing and able properly to perform the service proposed, has properly performed the service which it has been authorized to render, and is ready, able and willing to supply additional service to the Michigan markets; and (3) Michigan-Wisconsin [fol. 447] is not able properly to do the acts and perform the service proposed. Similar contentions as to point (1) and (2) above were presented by Panhandle in a motion to dismiss filed on April 5, 1946, and were also advanced orally on October 25, 1946, in the course of the proceedings herein.

It is stated by Panhandle that Michigan-Wisconsin proposes to supply to the Michigan Consolidated Gas Company (Michigan Consolidated) for distribution in the Detroit and Ann Arbor areas, among others, initially and until December 31, 1951, such volumes of natural gas as may be required in excess of the volumes Panhandle is presently authorized to supply in those areas to Michigan Consolidated and that Michigan-Wisconsin proposes, after December 31, 1951, to supply the entire natural-gas requirements of Michigan

Consolidated and thereby completely displace Panhandle as the wholesale supplier of the Detroit and Ann Arbor markets.

Panhandle also states that a substantial part of its market is located in and about the cities of Detroit and Ann Arbor, and that it has continuously supplied the entire natural-gas requirements of such areas since 1936. Furthermore, Panhandle is presently engaged in the transportation to and sale of natural gas for resale in the Detroit and Ann Arbor areas, among others, pursuant to the authorization of a "grandfather" certificate issued by the Commission on October 17, 1945, and various other certificates of public convenience and necessity authorizing construction, acquisition, and operation of such facilities as have been installed or acquired by Panhandle since February 7, 1942.

It is further contended that Panhandle has faithfully performed the service authorized by such certificates and now stands willing to continue such service and to render such additional service to the Detroit and Ann Arbor areas as is reasonable.

The Commission is of the opinion that it has been given statutory authority, pursuant to Section 7(g) of the Natural Gas Act, to grant a certificate of public convenience and necessity, upon a proper showing, to a natural-gas company or person which will thereby become a natural-gas company for service of an area already being served by [fol. 448] another natural-gas company under the authority of either "grandfather" or "non-grandfather" certificates of public convenience and necessity.

The Commission, having considered the motions to dismiss as filed by Panhandle on April 5 and November 19, 1946, and as presented orally in the proceeding on October 28, 1946, and the issues presented thereby, further finds that:

(1) The fact that Panhandle Eastern holds certificates from this Commission authorizing that company to transport gas to and sell such gas in the Detroit and Ann Arbor markets, among others, does not of itself preclude the Commission upon a proper showing, from authorizing another company to so transport and sell in the same markets.

(2) For the Commission to determine whether or not such a proper showing can be made upon such application

requires an opportunity for hearing and appropriate proceedings thereon.

(3) It is not necessary or appropriate for the purpose of deciding the legal issues presented by Panhandle's motion to decide whether a proper showing has been made for the grant or denial of a certificate of public convenience and necessity to Michigan-Wisconsin, or to decide as to the ability of Michigan-Wisconsin to do the acts and perform the service proposed, since the decision on those questions involves controverted issues of fact which are decided in the companion order and opinion to be entered by the Commission in this proceeding.

(4) It is not in the public interest to grant the aforesaid motion to dismiss:

It is ordered that:

The aforesaid motion to dismiss filed by Panhandle Eastern Pipe Line Company be and the same is hereby denied.

By the Commission.

Leon M. Fuquay, Secretary.

Date of Issuance: December 2, 1946.

[fol. 449] (Pages 22,464 to 22,469 of this exhibit 6 are a copy of the order of November 30, 1946, in Docket G-669, a copy of which is printed in full as a part of plaintiff's Exhibit No. 5, at pages 439 to 445 of this printed record.)

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

Before Commissioners: Leland Olds, Chairman; Claude L. Draper, Richard Sachse, Nelson Lee Smith and Harrington Wimberly

November 30, 1946.

In the Matter of PANHANDLE EASTERN PIPE LINE COMPANY

Docket No. G-706

Findings and Order Issuing Certificate of Public Convenience and Necessity

On March 21, 1946, Panhandle Eastern Pipe Line Company (Applicant) filed an application with the Commission, and on August 9, 1946, filed an amendment thereto, for a

certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, authorizing the construction and operation of certain natural-gas facilities designated in the said application as "Group B" facilities hereinafter more particularly described for utilization in the transportation and sale of natural gas, subject to the jurisdiction of this Commission.

The facilities designated as "Group B," which Applicant seeks authorization to construct and operate, are the following:

West of Liberal (Kansas) Compressor Station

(i) Sunray Compressor Station, additional 1000 horsepower compressor capacity at this station located in Moore County, Texas.

(ii) Hugoton Compressor Station, additional 2400 horsepower compressor capacity at this station in Stevens County, Kansas.

(iii) Guymon Compressor Station, a new compressor [fol. 450] station with 5000 horsepower capacity to be located in Hansford County, Texas.

(iv) Construction of 34 miles of 18" O.D. steel welded loop line, extending from the Hugoton Compressor Station and terminating at the Liberal Compressor Station.

At Liberal Station and at Points on the System East of Liberal Station

(v) Liberal Compressor Station, additional 6000 horsepower compressor capacity at this station.

(vi) Construction of 40.26 miles of 26" O.D. steel welded third loop line extending from Liberal (Kansas) Compressor Station in a northeasterly direction paralleling existing loop lines Nos. 100 and 200 and terminating with an interconnection with said line No. 200.

(vii) Construction of 34.47 miles of 26" O.D. steel welded third loop line extending from the Greensburg (Kansas) Compressor Station in a northeasterly direction paralleling existing loop lines Nos. 100 and 200 and terminating with an interconnection with said line No. 200.

(viii) Construction of 41.72 miles of 26" O.D. steel welded third loop line, consisting of two sections. The first section

is proposed to extend from the Haven (Kansas) Compressor Station in a northeasterly direction paralleling existing loop lines Nos. 100 and 200, a distance of 10 miles, and terminating with an interconnection with said loop line No. 200; the second section is proposed to extend from a point of interconnection with said line No. 200 near Whitewater, Butler County, Kansas, approximately 31.72 miles to another point of interconnection with said line.

(ix) Construction of 35.29 miles of 26" O.D. steel welded third loop line extending from Olpe (Kansas) Compressor Station in a northeasterly direction parallel with existing loop lines Nos. 100 and 200 and terminating with an interconnection with said line No. 200.

(x) Construction of 47.21 miles of 26" O.D. steel welded third loop line extending from Louisburg (Kansas) Compressor Station in a northeasterly direction paralleling existing loop lines Nos. 100 and 200 and terminating with an interconnection with said line No. 200.

[fol. 451] (xi) Construction of 33.65 miles of 26" O.D. Steel welded third loop line extending from Houstonia (Missouri) Compressor Station in a northeasterly direction paralleling existing loop lines Nos. 100 and 200 and terminating with an interconnection with said line No. 200.

(xii) Construction of 22.69 miles of 26" O.D. steel welded third loop line extending from Centralia (Missouri) Compressor Station in a northeasterly direction paralleling existing loop lines Nos. 100 and 200 and terminating with an interconnection with said line No. 200.

(xiii) Construction of 19.13 miles of 26" O.D. steel welded third loop line extending from Pleasant Hill (Illinois) Compressor Station in a northeasterly direction paralleling existing loop lines Nos. 100 and 200, and terminating with an interconnection with said loop line No. 200.

(xiv) Construction of 17.16 miles of 26" O.D. steel welded third loop line extending from Glenarm (Illinois) Compressor Station in a northeasterly direction paralleling existing loop lines Nos. 100 and 200 and terminating with an interconnection with line No. 200.

(xv) Construction of 28.28 miles of 26" O.D. steel welded loop line extending from a point of interconnection with

existing 24" line east of Zionville (Indiana) Compressor Station and terminating with an interconnection with the Edgerton (Indiana) Compressor Station.

(xvi) Construction of 36.90 miles of 26" O.D. steel welded loop line extending from a point of interconnection with existing 24" loop line in Defiance County, Ohio (northeast of Edgerton Compressor Station) in a northeasterly direction paralleling existing 22" single line, and terminating with an interconnection with said 22" line at a point in Lenawee County, Michigan.

(xvii) *General construction and installation changes.* In addition to the construction above described, Applicant proposes to retire all presently installed gate valves located at or near the proposed point of interconnection of said sections of new loop lines with main line No. 200 and install higher pressure valves at such points.

[fol. 452] (xviii) *River crossings.* Necessary river crossings proposed to be installed in connection with the construction of the proposed additional loop lines at the Arkansas River in Reno County, Kansas, at Neosho River in Lyon County, Kansas, and at Sangamon River in Sangamon County, Illinois.

(xix) Necessary valve and pipe changes at compressor stations located on main transmission line system, due to increase in operating pressures.

(xx) Construction of 5-2⅜" lateral lines extending from Applicant's 20" line south of Freedom Junction, Michigan, to the communities of Manchester, Clinton, Tecumseh, Blissfield and Deerfield, Michigan.

(xxi) An additional measuring and regulating station to be known as "Michigan Station" on Applicant's 20" lateral line south of Freedom Junction to be used in connection with Applicant's proposed sales of natural gas to Michigan Gas Storage Company. Applicant also seeks authorization to sell and deliver gas to Michigan Gas Storage Company under the provisions of its contract dated June 7, 1946, with the aforementioned company and to make such physical connection or connections with the proposed facilities of Michigan Gas Storage Company which are the subject of the application filed by that company and designated as Docket No. G-731.

By order of the Commission dated April 30, 1946, this proceeding was consolidated for purpose of hearing with the proceedings in Michigan-Wisconsin Pipe Line Company, Docket No. G-669, and on July 19, 1946, was an order entered consolidating for purpose of hearing, this proceeding with the proceeding in Michigan Gas Storage Company, Docket No. G-731. Pursuant to due notice, a public hearing in such consolidated proceeding was held in Washington, D. C., concluding with oral argument before the Commission on November 20-23 and 26, 1946, respecting the matters involved and the issues presented by the applications in such proceedings. The Kansas State Corporation Commission, National Utilities Company of Michigan, Michigan-Wisconsin Pipe Line Company, Order of Railway Conduc- [fol. 453] tors, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive *Firemen* and Enginemen and Switchmen of North America Indiana Gas & Water Co., Inc., Central Indiana Gas Company, Public Service Commission of Indiana, City of Detroit, National Coal Association, United Mine Workers of America, Consumers Power Company, City of Dearborn, Michigan, Battle Creek Gas Company, were permitted to intervene in this proceeding.

The Applicant is a Delaware corporation having a principal place of business in Kansas City, Missouri. It is engaged in the production and purchase of natural gas in the Panhandle Field in the State of Texas, in the Hugoton Field in the States of Kansas, Oklahoma, and Texas, and in the transportation of such natural gas by means of its pipeline system extending from a point in Moore County, Texas, through the States of Oklahoma, Kansas, Missouri, Illinois, Indiana, Ohio and Michigan; and in the sale of such gas for resale for ultimate public consumption for domestic, commercial, industrial and other uses in States other than those in which it is produced or purchased.

The estimated cost of the proposed "Group B" facilities is approximately $23,751,550. The proposed facilities are necessary to augment Applicant's present system capacity in order that it may be able to better meet the increased firm market demands upon its system. The proposed "Group B" facilities will enable Applicant to increase its present designed system capacity from 393,000 Mcf daily to approximately 473,000 Mcf.

The proposed operation of the additional facilities in conjunction with all of applicant's existing facilities is re-

quired for the continuance of adequate natural-gas service to the customers presently served by Applicant's transmission pipeline system.

The Commission, having considered the application, and the amendment thereto, and the record thereon with respect to the matters involved and the issues presented, further finds that:

(1) Applicant is engaged in the transportation of natural gas in interstate commerce and in the sale in interstate com- [fol. 454] merce of natural gas for resale for ultimate public consumption, and is, therefore (as heretofore found by the Commission in its Opinion No. 80 and order entered on September 23, 1942, in Docket Nos. G-200 and G-207), a "natural-gas company" within the purview of the Natural Gas Act.

(2) The facilities hereinbefore described as the "Group B" facilities are proposed to be used for the transportation and sale of natural gas, subject to the jurisdiction of the Commission, as integral parts of Applicant's pipeline system, and the proposed construction and operation thereof are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act, as amended.

(3) Applicant's gas supply is adequate to meet the requirements of the service to be rendered by means of the proposed facilities.

(4) Applicant is financially able to construct and operate the proposed facilities, and such construction and operation will have no adverse effect on existing rates and services.

(5) Applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act, as amended, and the requirements, rules, and regulations of the Commission thereunder.

(6) The construction and operation by Applicant of the proposed facilities are required by the public convenience and necessity, and a certificate authorizing such proposed construction and operation should be issued, as hereinafter ordered and conditioned.

The Commission orders that:

(A) A certificate of public convenience and necessity be and it hereby is issued authorizing the construction and operation by the Applicant of the proposed facilities referred to above as the "Group B" facilities and more fully described in the application, as amended, in this proceeding for the transportation and sale of natural gas therein set forth, subject to the jurisdiction of the Commission upon the terms and conditions of this order. Action on applicant's request for approval of its contract dated June 7, 1946, with [fol. 455] Michigan Gas Storage Company for the delivery and sale of natural gas to said company is reserved pending disposition by the Commission of the application in the matter of Michigan Gas Storage Company, Docket No. G-731.

(B) This certificate is granted upon the express condition that the facilities herein authorized shall not be used for the transportation or sale of natural gas to any new customers except upon specific authorization by this Commission.

(C) Applicant shall report to the Commission in writing, under oath, the date of completion of the facilities heretofore described and the date of commencement of operations.

(D) This certificate is not transferable and shall be effective only so long as Applicant continues the operations hereby authorized in accordance with the provisions of the Natural Gas Act, as amended, and any pertinent rules, regulations or orders heretofore or hereafter issued by the Commission.

By the Commission.

Leon M. Fuquay, Secretary.

Date of Issuance: December 2, 1946.

PLAINTIFF'S EXHIBIT 7

Federal Power Commission. Office of the Secretary

Commissioners and Their Offices

November 30, 1946.

1002-Formal. G-669

Frank Conrad, President, Michigan-Wisconsin Pipe Line Company, 2200 Bankers Building, 105 West Adams Street, Chicago 3, Illinois.

Commission today adopted Findings and Order, denying motion of Panhandle Eastern Pipe Line Company to dismiss application of Michigan Wisconsin Pipe Line Company in Docket No. G-669. Commission adopted Findings and Order in Docket No. G-706, issuing certificate of convenience and necessity to Panhandle Eastern Pipe Line Company. Commission adopted Opinion and Order in Docket No. G-[fol. 456] 669, issuing certificate, with conditions, to Michigan Wisconsin Pipe Line Company. Supporting and dissenting opinions in last named docket will be available at early date. All orders available afternoon December 2.

Leon M. Fuquay, Secretary, Federal Power Commission.

Same telegram to be sent to:

John S. L. Yost, Counsel, Panhandle Eastern Pipe Line Company, Equitable Building, 120 Broadway, New York, New York.

A. J. Mayotte, Secretary, Michigan Gas Storage Company, 212 Michigan Avenue, West, Jackson, Michigan.

Michigan Public Service Commission, Lansing 13, Michigan.

Railroad Commission of Texas, Austin 11, Texas.

Corporation Commission of Oklahoma, Oklahoma City 5, Oklahoma.

State Corporation Commission of Kansas, Topeka, Kansas.

Public Service Commission of Missouri, Jefferson City, Missouri.

Public Service Commission of Mississippi, Jackson, Mississippi.

Iowa State Commerce Commission, Des Moines, Iowa.

Illinois Commerce Commission, Springfield, Illinois.

Public Service Commission of Indiana, Indianapolis, Indiana.

Public Utility Commission of Ohio, Columbus, Ohio.

Public Service Commission of Wisconsin, Madison 3, Wisconsin.

Amos M. Mathews, Esq., 204 South Canal Street, Chicago 6, Illinois.

Edmond W. Hebel, Attorney, Indiana Gas & Water Company, Inc., 110 North Illinois Street, Indianapolis 4, Indiana.

[fol. 457] Robert N. Batton, Esq., % Messrs. Van Alta, Batton & Harker, First National Bank Building, Marion, Indiana.

City of Cincinnati, Ohio, Att: Henry B. Bruestle, 214 City Hall, Cincinnati 2, Ohio.

Philip H. Porter, Attorney, Lake Michigan Docks Association, 1 West Main Street, Madison 3, Wisconsin.

City of Detroit, Michigan, 301 City Hall, Detroit 26, Michigan. Attention: William E. Dowling.

S. E. Campbell, Secretary, Natural Gas Pipe Line Co. of America, 20 North Wacker Drive, Chicago 6, Illinois.

Lawrence I. Shaw, Attorney, Northern Natural Gas Company, Aquila Court Building, Omaha 1, Nebraska.

Edward H. Lange, Esq., Panhandle Eastern Pipe Line Co., 1221 Baltimore Avenue, Kansas City 6, Missouri.

Padway and Goldberg, Attorneys, Associated Coke Plant Employees, et al., 511 Warner Theatre Building, 212 West Wisconsin Avenue, Milwaukee 2, Wisconsin.

Charles W. Stadell, Esq., Central Illinois Coal Operators Committee, 307 North Michigan Avenue, Chicago 1, Illinois.

A. J. Christiansen, Secy. & Mgr., Middle States Fuel, Inc., et al., 307 North Michigan Avenue, Chicago, Illinois. *Wells Street, Milwaukee 2, Wisconsin.*

Walter J. Nattison, City Attorney, 801 City Hall, 200 East Wells Street, Milwaukee 2, Wisconsin.

Robert H. Allison, Attorney, United Mine Workers of America, District No. 12, 400 East Monroe Street, Springfield, Illinois.

Joseph M. Crockett, Attorney, Pocahontas Operators Association, First National Bank Building, Welch, West Virginia.

Jerome M. Joffee, Esq., Special Utilities and Legislative Counsel, Kansas City, Missouri.

Joseph B. Fleming, Manly K. Hunt, Chicago Coal Merchants Association, 33 N. LaSalle Street, Chicago 2, Illinois.
[fol. 458] Roy S. Kern, Attorney, B. & O. Railroad Co., et al., 836 Wabash Building, Pittsburgh 22, Pennsylvania.
City of Dearborn, Michigan, Municipal Building, Dearborn, Michigan. Att: Dale H. Fillmore, General Counsel.
Miller, Mack & Fairchild, Attys., Wisconsin Public Service Corporation, 735 North Water Street, Milwaukee 2, Wisconsin.
Winthrop, Stimson, Putnam & Roberts, No. 30 Liberty Street, New York 5, New York.
Cities Service Gas Company, First National — Building, Oklahoma City 1, Oklahoma.
C. C. Lydick, Managing Director, Coal Trade Association of Indiana, 632 Cherry Street, Terre Haute, Indiana.
Joseph W. McAuliffe, Attorney, Mustard, McAuliffe, Hatelt & Clagett, 1609 Security National Bank Building, Battle Creek, Michigan.
Glenn W. Clark, Attorney, First National Bank Building, Oklahoma City 1, Oklahoma.
Messrs. Shearman, Sterling & Wright, 55 Wall Street, New York 5, New York.
John W. Scott.

Docketed November 30, 1946.

NOTE RE PLAINTIFF'S EXHIBIT 8

Plaintiff's Exhibit 8 is a document which shows acknowledgment by R. F. Gonecelly for Michigan-Wisconsin Pipe Line Company and of D. H. Culton for Panhandle Eastern Pipe Line Company on December 2, 1946, at Washington, D. C., of the three orders entered by the Federal Power Commission on November 30, 1946, in the matter of Michigan-Wisconsin Pipe Line Company, Docket No. 669, and Panhandle Eastern Pipe Line Company, Docket G-706.

[fol. 459] PLAINTIFF'S EXHIBIT 9

Federal Power Commission, Docketed. Dec. 2, 1946

Frank L. Conrad, President, Michigan-Wisconsin Pipe Line Company, 2200 Bankers Building, 105 West Adams Street, Chicago 3, Illinois. 443504

Re: Panhandle Eastern Pipe Line Company, et al.

Docket Nos. G-669, et al.

DEAR SIR:

Enclosed are the orders entered by the Commission on November 30, 1946, in the above entitled matters.

Very truly yours, Leon M. Fuquay, Secretary.

Enclosure. Registered.

Copy of same letter sent Registered to: 443505

John S. L. Yost, Counsel, Panhandle Eastern Pipe Line Company, Room 1123, Equitable Bldg., 120 Broadway, New York 5, N. Y.

A. J. Mayotte, Secretary, Michigan Gas Storage Company, 212 Michigan Avenue, West, Jackson, Michigan. 443506 cc: Reg. Off.: Fort Worth, Texas; Chicago, Ill., Atlanta, Ga., N. Y. C.

Publications
Div. of Gas Certificates
Law(2)
BH:nfm 12/2/46

(Attached to the foregoing letter is a 3-page distribution list for copies of the orders referred to in the letter, the list being headed by the words: "Copy of order sent to the following:")

NOTE RE PLAINTIFF'S EXHIBIT 10, 11 AND 12

Plaintiff's Exhibits 10, 11 and 12 are Post Office Department registered letter return receipts bearing, respectively, registered article numbers 443,504, 443,505 and 443,506, show that Frank L. Conrad (Michigan-Wisconsin Pipe Line Com-
[fol. 460] pany), J. S. L. Yost (Panhandle Eastern Pipe Line Company) and A. J. Mayotte (Michigan Gas Storage Company) received the letter (plaintiff's Exhibit 9) of the

Secretary of the Federal Power Commission, dated December 2, 1946, enclosing the three orders of the Commission dated November 30, 1946, on, respectively, December 4, December 3, and December 5, 1946.

NOTE RE PLAINTIFF'S EXHIBIT 13

Plaintiff's Exhibit 13 is a copy of the minutes of the 2,121st meeting of the Federal Power Commission held on December 3, 1946. They recite that the minutes of the 2116th, 2117th, 2118th, 2119th and 2120th meetings of November 26, 27, 29, 30 and December 2, respectively, were read and approved, and that other action not material here was taken by the Commission on said date, December 3, 1946. No mention is made in this exhibit of any action taken by the Commission in Docket G-669 or in Docket G-706.

PLAINTIFF'S EXHIBIT 14

Wheat, May, Shannon and St. Clair, Attorneys at Law
Washington 5, D. C.

December 13, 1946.

Federal Power Commission, 1800 Pennsylvania Avenue, N. W., Washington, D. C.

GENTLEMEN:

In compliance with the requirements of Paragraph (B) (v) of the Commission's Findings and Order Issuing Certificate of Public Convenience and Necessity, of November 30, 1946, In the Matter of Michigan-Wisconsin Pipe Line Company, Docket No. G-669, there is transmitted herewith for filing, application of the Austin Field Pipe Line Company for a certificate of public convenience and necessity.

In compliance with the requirements of Paragraph (B) (iv) of the said Order in Docket No. G-669, there is transmitted herewith for filing, a lease between Michigan Consolidated Gas Company and Michigan-Wisconsin Pipe Line Company.

There is also transmitted herewith for filing, a certificate showing service of the above documents upon all the parties in Docket No. G-669 & G-834.

[fol. 461] With reference to the requirements of Paragraph (B) (vi) of said Order of the Commission in Docket No. G-669, an application is in course of preparation and will be filed promptly on behalf of Michigan Consolidated Gas Company.

Very truly yours, Charles V. Shannon.

Enclosures

Received December 13, 1946, Federal Power Commission.

Acknowledge: December 16, 1946, Secretary.

The first enclosure with the foregoing letter was an application, verified December 10, 1946, for a Certificate of Public Convenience and Necessity by Austin Field Pipe Line Company to construct certain facilities consisting principally of facilities required for the transportation of natural gas from the Austin and Reed City gas storage fields near Big Rapids, Michigan, to the city gates of Mount Pleasant, Ann Arbor and Detroit, Michigan, including a 26" pipe line, approximately 140 miles in length. Among other things the application, page 5, states that "Applicant will not operate the facilities it proposes to construct, but such facilities will be operated by Michigan-Wisconsin in the latter's service of natural gas to the various districts of Michigan Consolidated." Said application was received and filed by the Secretary of the Federal Power Commission on December 13, 1946, and docketed as Docket No. G-834. (For more detailed synopsis of this application see plaintiff's Exhibit No. 16.)

The second enclosure was a lease by the Michigan Consolidated Gas Company to Michigan-Wisconsin Pipe Line Company, dated December 9, 1946, in which Michigan Consolidated Gas Company, lessor, leased to Michigan-Wisconsin Pipe Line Company, lessee, certain described properties including the natural gas underground storage and transportation properties of lessor situated in the State of Michigan. The lease then proceeds to describe certain pipe lines, allied equipment, lands owned in fee; gas storage rights in land, oil and gas leases on lands, certain named

[fol. 462] gas wells, and gathering systems in designated areas or counties in the State of Michigan.

The third enclosure was a certificate of service.

PLAINTIFF'S EXHIBIT 15

United States of America, Federal Power Commission

December 14, 1946.

Before Commissioners: Leland Olds, Chairman; Claude L. Draper, Richard Sachse, Nelson Lee Smith and Harrington Wimberly.

In the Matter of Michigan-Wisconsin Pipe Line Company

Docket No. G-669

Order Modifying Order Issuing Certificate of Public Convenience and Necessity

Upon consideration of the Commission's order of November 30, 1946, issuing a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, authorizing, among other things, the construction and operation of certain natural-gas transmission pipeline facilities;

The Commission finds that:

It is appropriate in the circumstances and in the public interest that the said order issuing a certificate in this matter be modified as hereinafter ordered.

The Commission orders that:

(A) The aforesaid order of November 30, 1946, be and it is hereby modified so that paragraph (B) (viii) shall read as follows:

"This certificate is granted upon the express condition that the facilities herein authorized shall not be used for the transportation for or sale of gas to the Michigan Consolidated Gas Company for resale in Detroit and Ann Arbor except with due regard to the rights and duties of Panhandle Eastern in its established service for resale in Detroit and

Ann Arbor, Michigan, under its presently existing contract with Michigan Consolidated and in accordance with the provisions of the Natural Gas Act; and such rights and duties [fol. 463] shall by supplemental order, to be issued within thirty days from the date of this order, be determined on the basis of:

(1) Panhandle's rights, obligations and service under its Grandfather certificate and subsequent certificates when such certificates were granted by this Commission;

(2) Panhandle's contractual and actual deliveries of natural gas for resale in the years 1942, 1943, 1944, 1945, and 1946;

(3) Panhandle's rights and obligations at the date of termination of the existing contract, on December 31, 1951.

"Jurisdiction is specifically reserved by the Commission to reopen these proceedings, if need be, for the purpose of such determination."

(B) Nothing contained in this order shall be construed as in any manner changing or affecting the Commission's order of November 30, 1946, except as herein modified.

By the Commission. Chairman Olds and Commissioner Draper not participating.

J. H. Gutride, Acting Secretary.

Date of Issuance: December 16, 1946.

NOTE RE PLAINTIFF'S EXHIBIT 16

Plaintiff's Exhibit 16 consists of two docket sheets, front and back sides, in Docket No. G-834. In lieu of printing the exhibit in full the following synopsis contained in said docket sheets and the following excerpts from said docket sheets are printed by stipulation of the parties:

Synopsis:

Application filed by Austin Field Pipe Line Company for a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, to authorize the construction of the following natural-gas pipeline fa-

cilities, subject to the jurisdiction of the Federal Power Commission:

(a) A 26-in. O.D. steel pipeline, approx. 140 mi. in length, from a point at the Austin Storage Field Mecosta County, Mich., to a point in Oakland County, Mich.

[fol. 464] (b) A 6⅝-in. O.D. steel pipeline, approx. 25 mi. in length, from the proposed Austin-Detroit Line near the intersection of Rowe and Milford Roads, Oakland County, Mich., to a metering station at 847 Broadway, Ann Arbor, Washtenaw County, Mich.

(c) A 6⅝-in. O.D. steel pipeline, approx. 10 mi. in length, from a point in Richland Township Montcalm County, Mich., to a point in Union Township, Isabella County, Mich.

(d) A 10¾-in. O.D. steel pipeline, approx. 4½ mi. in length, from a point near NW corner of Sec. 5, Walker Township, Kent County, Mich., to a point near SE corner, Sec. 11 in Walker Township, connecting the proposed 22-in. pipeline of Michigan-Wisconsin Pipe Line Company.

(e) A 24-in. O.D. steel pipeline approx. 22 mi. in length, from a point in the Austin Storage Field in Austin Township, Mecosta County, Mich., to a point in the Reed City Field in Lincoln Township Osceola County, Mich.

(f) A gas compressor sta-ion (6,000 H.P.) on the Austin-Detroit Line at the Austin Storage Field.

The total over-all cost of construction of the proposed facilities is estimated by Applicant at $7,188,592, and Applicant proposes to finance the construction through the sale of all its common stock having a total par value of $500,000 to Michigan-Consolidated, and through bank loans, the terms of which will not extend beyond December 31, 1951.

Hearings: April 14, 21, 22, 23, 1947, Washington, D. C. August 13, 14, 15, 19, 1947, Washington, D. C.

* * * * * * *

Excerpts:

December 13, 1946. Filed application for certificate of public convenience and necessity, pursuant to order entered 11 30 46 in Docket No. G-669 together with Exhibits A, A-2, A-4, B, C, D, and E.

March 20, 1947. Order entered consolidating proceedings in Dockets G-834 and G-839 for purposes of hearing; fixing date of hearing for 4/14/47 at 10 a. m. (E.S.T.), 1800 Penna. [fol. 465] Ave., N. W., Washington, D. C., and allowing interested State commissions to participate.

* * * * * * *

August 1, 1947. Order entered consolidating proceedings in Docket Nos. G-384, G-839 and G-918 for purposes of hearing; fixing date of hearing for 8/13/47, 10:00 a. m. (EDST), 1800 Pennsylvania Avenue, N. W., Washington, D. C.; and allowing interested State commissions to participate.

* * * * * * *

November 13, 1947. Findings and Order entered issuing certificate of public convenience and necessity covering portion of application filed 12/13/46, upon the condition that applicant obtain from the Securities and Exchange Commission such approvals as are necessary to the financing of the construction of the proposed facilities; jurisdiction be retained in the Commission for future disposition of the application insofar as disposition thereof is not made by the certificate granted herein; and requiring applicant to report dates of completion of construction of facilities, and commencement of operation.

* * * * * * *

PLAINTIFF'S EXHIBIT 17

Wheat, May, Shannon and St. Clair

Attorneys at Law

Washington 5, D. C., December 26, 1946

Federal Power Commission, 1800 Pennsylvania Avenue, N. W., Washington, D. C.

GENTLEMEN:

In compliance with the requirements of Paragraph (B)(vi) of the Findings and Order Issuing Certificate of Public Convenience, which the Commission entered on November 30, 1946, In the Matter of Michigan-Wisconsin

Pipe Line Company, Docket No. G-669, we are transmitting herewith for filing application of Michigan Consolidated Gas [fol. 466] Company, together with a Certificate of Service of such application upon all parties in the above-mentioned Docket No. G-669.

Very truly yours, Charles V. Shannon.

Enclosures.

Received December 26, 1946. Federal Power Commission.
Acknowledged December 27, 1946. Secretary.

The first enclosure with the foregoing letter was an application, verified on December 23, 1946, for a Certificate of Public Convenience and Necessity by Michigan Consolidated Gas Company for installation of certain additional facilities consisting principally of certain additional wells and gathering lines in the Austin and Reed City gas fields near Big Rapids, Michigan. Said application was received and filed by the Secretary of the Federal Power Commission on December 26, 1946, and docketed as Docket No. G-839. (For more detailed synopsis of this application see plaintiff's Exhibit No. 18.)

The second enclosure was a certificate of service.

NOTE RE PLAINTIFF'S EXHIBIT 18

Plaintiff's exhibit No. 18 consists of two docket sheets, front and back sides, in Docket No. G-839. In lieu of printing the exhibit in full the following synopsis contained in, and the following excerpts from, said docket sheets are printed by stipulation of the parties:

Synopsis:

Application filed by Michigan Consolidated Gas Company for a cert. of public conv. and necessity pursuant to Section 7 of the Natural Gas Act, as amended, to authorize Applicant to install additional well, field lines and appurtenant facilities in Austin and Reed City fields, located near Big Rapids, Michigan, which fields, upon the completion of a proposed interstate natural-gas transmission pipeline proj- [fol. 467] ect to be constructed and operated by Michigan-Wisconsin Pipe Line Co., are to be leased to and operated by and subsequently sold to Michigan-Wisconsin as gas

storage fields as integral parts of said proposed pipeline project. This application was filed pursuant to the Commission's order of November 30, 1946, in Docket No. G-669.

(a) Applicant seeks authorization to install the following described additional facilities in Austin Field;

(1) 27 gas wells, 8 dry holes, 40 wellhead-piping-and-structures units, 40 well heaters, and appurtenant facilities;

(2) Field lines consisting of approximately 3,286′ of 3″ pipe, 17,393′ of 4″ pipe, 8,523′ of 6″ pipe, 6,295′ of 8″ pipe, 6,411′ of 12″ pipe, 1,244′ of 16″ pipe, and 200′ of 24″ pipe.

(b) Applicant seeks authorization to install the following described additional facilities, first group facilities, in Reed City Field:

(1) 25 gas wells, 25 wellhead-piping-and-structures units, and appurtenant facilities;

(2) Field lines consisting of approx. 5,280′ of 3″ pipe, 8,580′ of 4″ pipe, 3,960′ of 6″ pipe, 6,600′ of 8″ pipe, 1,980′ of 10″ pipe, 1,320′ of 12″ pipe, and 22,012′ of 24″ pipe.

(c) Applicant seeks authorization to install the following described additional facilities, second group facilities, in Reed City Field:

(1) 34 gas wells, 59 wellhead-piping-and-structures units, eighty-three well heaters, and appurtenant facilities.

(2) Field lines consisting of approx. 15,780′ of 3″ pipe, 19,800′ of 4″ pipe, 13,320′ of 6″ pipe and 6,600′ of 8″ pipe.

Applicant estimates the total over-all cost of all of the proposed facilities described herein to be $1,572,450, which it proposes to finance with funds from its own treasury. Of this amount, $502,250 has been expended by Applicant for that portion of the facilities described herein and already installed, leaving $1,070,200 as the total over-all capital cost of the facilities described herein which remain to be installed.

[fol. 468] Hearings: April 14, 21, 22, 23, 1947. Washington, D. C. August 13, 14, 15, 19, 1947. Washington, D. C.

* * * * * * *

Excerpts:

December 26, 1946. Filed application for certificate of public convenience and necessity, pursuant to order entered 11/30/46 in Docket No. G-669, together with Exhibits A, A-2, A-4, B, E and Certificate of Charles V. Shannon showing service thereof on parties of record on this day.

* * * * * * *

March 20, 1947. Order entered consolidating proceedings in Dockets G-834 and G-839 for purposes of hearing; fixing date of hearing for 4/14/47 at 10 a. m. (EST), 1800 Penna. Ave., N. W., Washington, D. C., and allowing interested State commissions to participate.

* * * * * * *

August 1, 1947. Order entered consolidating proceedings in Docket Nos. G-834, G-839 and G-918 for purposes of hearing; fixing date of hearing for 8/13/47, 10:00 a. m. (EDST), 1800 Pennsylvania Avenue, N. W., Washington, D. C., and allowing interested State commissions to participate.

* * * * * * *

November 13, 1947. Findings and order entered issuing certificate of public convenience and necessity covering portion of application filed 12/26/46, without prejudice to future Commission action in matters now pending in Docket No. G-353; upon the condition that (1) applicant shall obtain from Securities and Exchange Commission such approvals as are necessary to the financing of the construction of the proposed facilities; (2) jurisdiction be retained in the Commission for future disposition of the application insofar as disposition thereof is not made by the certificate granted herein, (3) certificate granted herein shall not authorize applicant to continue operations after 12/31/51, or discontinue operations before 12/31/51, without further authorization by the Commission; and requiring applicant to report dates of completion of construction of facilities and commencement of operation.

* * * * * * *

[fol. 469] PLAINTIFF'S EXHIBIT 19

United States of America. Federal Power Commission: Before Commissioners: Leland Olds, Chairman; Claude L. Draper, Richard Sachse, Nelson Lee Smith and Harrington Wimberly

December 30, 1946.

In the Matter of Michigan-Wisconsin Pipe Line Company

Docket No. G-669

Order Supplementing Order Issuing Certificate of Public Convenience and Necessity and Reopening Proceeding for Limited Purpose

Upon further consideration of the record herein, related opinions and orders, and the Commission's order of November 30, 1946 (as modified by order of December 14, 1946), issuing a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, authorizing, among other things, the construction and operation of certain natural-gas transmission pipeline facilities; and with particular reference to paragraph (B) subdivision (viii) of our order of November 30, 1946, as modified; and

It appearing to the Commission that:

(a) On April 17, 1942, a joint application was filed by Panhandle Eastern Pipe Line Company ("Panhandle Eastern"), Illinois Natural Gas Company ("Illinois Natural"), and Michigan Gas Transmission Corporation ("Michigan Gas"), designated as Docket No. G-254, for a grandfather certificate pursuant to Section 7(c) of the Natural Gas Act, as amended, to authorize the continuation of the operations subject to the Commission's jurisdiction, in which they were bona fide engaged on February 7, 1942, and subsequent thereto.

(b) In the Commission's order of October 17, 1945, Panhandle Eastern's operations as of February 7, 1942, and thereafter, were described as follows: "Panhandle Eastern on and continuously since February 7, 1942, has owned and [fol. 470] operated, among other facilities, a natural-gas main transmission pipeline extending from a point in Moore County, Texas, known as 'Windmill Junction' through the States of Oklahoma, Kansas, Missouri and Illinois and into the State of Indiana to a point near Dana, near the Illinois-Indiana boundary. Among its other operations, Applicant

has been and is engaged in producing and purchasing natural gas in the Panhandle field located in the State of Texas and the Hugoton field located in the States of Kansas, Oklahoma and Texas, and in transporting such gas for resale for ultimate public consumption, in states other than those in which it is produced or purchased, for domestic, commercial, industrial and other uses by means of such pipeline facilities. In such operations, the flow of gas from Texas, Kansas and Oklahoma to the points of distribution is continuous and uninterrupted and such operations constitute an established course of business."

(c) It was also noted in our order of October 17, 1945, that the application for a "grandfather" certificate as originally filed included a request for a certificate under the "grandfather clause" of Section 7(c) of the Natural Gas Act, as amended, to authorize the operation, among other things, of certain natural-gas transmission pipeline facilities which were then in course of construction and not in service. Such facilities, not being in bona fide operation on February 7, 1942, the effective date of the amendment, were not the proper subject of a "grandfather" certificate. Accordingly, Panhandle Eastern, at the suggestion of the Commission, filed an application on February 25, 1943, in Docket No. G-452, for a "non-grandfather" certificate of public convenience and necessity to authorize its operation of such facilities; and after hearing, the Commission entered an order therein on February 3, 1945, issuing a certificate of public convenience and necessity.

(d) On June 5, 1943, Panhandle Eastern filed a supplemental application in Docket No. G-452 for authority to acquire and operate all of the facilities which were formerly owned by Michigan Gas and Illinois Natural, such facilities having been acquired from the latter companies by Pan- [fol. 471] handle Eastern on March 31, 1943. On February 3, 1945, an order was entered in Docket No. G-452 authorizing the operation of such facilities by Panhandle Eastern.[1]

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[1] For detailed description of the facilities acquired by Panhandle Eastern on March 31, 1943, of Michigan Gas which were in bona fide operation on February 7, 1942, and used for the transportation and sale of gas in interstate commerce in the States of Indiana, Ohio and Michigan; reference is made to the applications filed in Docket Nos. G-254 and G-452.

(e) The Commission, by its order of October 17, 1945, in Docket No. G-254 provided that: "A certificate of public convenience and necessity be and hereby is issued to Panhandle Eastern authorizing its continued operation of its facilities, which were in bona fide operation [by it] on February 7, 1942, and have been so operated since then, as described in its application, as amended, for the transportation and sale of natural gas, subject to the jurisdiction of this Commission."

(f) Panhandle Eastern's pattern of service in relation to its transportation, and sale of natural gas subject to the jurisdiction of the Commission, in the Detroit and Ann Arbor Districts in the State of Michigan as of February 7, 1942, and thereafter is shown by its contracts and deliveries thereunder, which contracts were in force and effect as of that date and so remain until various periods in 1951. Such contracts were received in evidence in this proceeding as Exhibits 248 through 252, and 267 through 273, which relate especially to gas sales made in the State of Michigan during the years 1942 to 1946.

(g) Panhandle Eastern, due to continually expanding markets throughout the states served by it, namely, Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana, Kentucky, Ohio and Michigan, has found it necessary to seek authorizations to augment its pipeline capacity in an effort to meet the increased market demands of domestic and other necessary general service customers. As a result, the Commission has in the past three years, authorized increases in Pan [fol. 472] handle's pipeline capacity of approximately 223,000,000 cubic feet daily.[2]

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[2] Docket Nos. G-459, G-620 and G-706. (In Docket Nos. G-612 and G-619, the Commission authorized Panhandle Eastern to export up to 5,500,000 Mcf of natural gas annually, such authorization, however, precluding deliveries during the months of January, February, March, November and December in any year during the term of the contract due to the serious situation confronting Panhandle Eastern in meeting the firm requirements on its system and the inability of Panhandle Eastern to satisfy those requirements and at the same time export gas to Canada during such months.)

(h) The following tabulation illustrates the firm sales requirements on the Panhandle Eastern system on a zero-degree day:

Statemen of Estimated Peak Day Deliveries Total Main Line Sales, Mcf on a Zero-Degree Day [3]

Year	Requirements Sales	Curtailments	Supplied Sales
1947-48	511,540	38,265	473,275
1948-49	530,914	54,420	476,494

(i) The load imposed upon Panhandle Eastern's system by the requirements of the present winter heating season caused the Commission to initiate public hearings In the Matter of Panhandle Eastern Pipe Line Company, Docket Nos. G-200 and G-207, and also conferences with the company, its customers, and representatives of State Commissions resulting in the adoption of "Emergency Service Rules and Regulations to Govern Deliveries of Natural Gas by Panhandle When Curtailment of Natural Gas Deliveries Is Necessary During the Winter Heating Season of 1946-1947."

The Commission finds that:

(1) Panhandle Eastern's "grandfather" certificate, although subject to liberal interpretation, should not be construed as extending such authorization beyond substantial parity with the operations, service, transportation and sale actually performed on February 7, 1942. This finding is equally applicable to such authorization as granted Panhandle Eastern by our order issuing a "non-grandfather" [fol. 473] certificate adopted February 3, 1945, at Docket No. G-452. The pattern of service both as of February 7, 1942, and February 3, 1945, can best be described by Panhandle Eastern's actual deliveries of natural gas under its contracts with Michigan Consolidated Gas Company (Michigan Consolidated) for resale in the Detroit and Ann Arbor Districts in the years 1942-1946.

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[3] Per Exhibit 289, assuming installation of all facilities covered by existing authorizations.

(2) Panhandle Eastern's actual deliveries of natural gas for resale in the years 1942, 1943, 1944, 1945 and 1946 (so far as available) are set forth in the following tabulation:

Detroit District Annual Sales		Ann Arbor District Annual Sales	
Year	MCF	Year	MCF
1942	26,315,046	1942	407,300
1943	31,278,739	1943	439,000
1944	31,520,211	1944	451,900
1945	32,089,480	1945	449,800
	Maximum Day Deliveries		Maximum Day Deliveries
1942	123,277	1942	1,800
1943	122,818	1943	1,800
1944	122,420	1944	1,800
1945	127,562	1945	1,800
(1946 to 4/25/46)	126,332		

(3) On the basis of the existing contracts referred to, Michigan Consolidated was, on February 7, 1942, and still is obligated to take or pay for approximately 20,833,333 Mcf of gas annually insofar as its requirements relate to Detroit District, and 291,913 Mcf annually for distribution in the Ann Arbor District. Panhandle Eastern is committed to deliver on a daily basis upon demand of Michigan Consolidated, 125,000 Mcf of gas over the remaining years of its contract with Michigan Consolidated and 2,000 Mcf for distribution in Ann Arbor.

(4) In the light of the contractual obligations, on the parts of both Panhandle Eastern and Michigan Consolidated under existing contracts which have several years to run, it is equitable that Panhandle Eastern be permitted to supply [fol. 474] gas as outlined under the agreements referred to under the terms and conditions as contained therein and that Michigan Consolidated likewise be permitted to purchase under said contracts natural gas for supplying gas for resale in the Detroit and Ann Arbor Districts.

(5) Panhandle Eastern's rights and obligations at the date of expiration of its contract with Michigan Consolidated in relation to the Detroit District, on December 31, 1951, are clearly set forth in Exhibits 248-252 and, in the

absence of any amendment or extension thereof, under the terms of the contract as indicated, the instrument may be terminated as of the aforementioned date.

(6) If no further contract be entered into by and between Panhandle Eastern and Michigan Consolidated prior to or upon termination of the existing contract for the supply of gas in the Detroit District, Panhandle Eastern may, under certain circumstances, be able to continue to supply the natural gas service which it has heretofore rendered in the Detroit and Ann Arbor Districts under its "grandfather" and "non-grandfather" certificates issued at Docket Nos. G-254 and G-452 in keeping with the pattern of service rendered at the time such certificates were issued.

(7) The public interest requires that a reasonable length of time and every reasonable opportunity be granted to the managements of Panhandle Eastern, Michigan-Wisconsin and Michigan Consolidated for the exercise of their respective managerial responsibility and obligation to the end that a mutually satisfactory understanding and agreement be reached assuring the continuity of adequate natural gas service to the people of the State of Michigan, under such terms and conditions as may be approved by appropriate public authorities.

(8) It is appropriate under the circumstances, and also by reason of the facts appearing in Docket Nos. G-200, G-207, and G-706, that the record in the above-docketed proceeding be reopened for the purpose of receiving such evidence as the Commission may in its discretion consider material for further consideration of Subdivision (viii) of Paragraph (B) of our order of November 30, 1946, as modified by order of December 14, 1946.

[fol. 475] The Commission orders that:

(A) The record in the above-entitled proceeding be and it is hereby reopened, limited, however, to the receipt of further evidence with respect to Subdivision (viii) of Paragraph (B) of the Commission's order of November 30, 1946, as modified by order of December 14, 1946.

(B) The order herein of November 30, 1946, as modified by our order of December 14, 1946, is hereby further modified by adding to such order of November 30, 1946, as

modified, the above paragraphs (1) through and including paragraph (8) which shall appear and be considered a part thereof of our findings as paragraphs (9) through (17).

(C) Nothing contained in this order shall be construed as in any manner changing or affecting the Commission's order adopted November 30, 1946, issuing a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company except as herein supplemented.

By the Commission. Chairman Olds not participating. Commissioner Draper dissenting.

Leon M. Fuquay, Secretary.

Date of Issuance: December 31, 1946.

PLAINTIFF'S EXHIBIT 21

Michigan-Wisconsin Pipe Line Company

Chicago, Illinois, January 13, 1947.

Federal Power Commission, 1800 Pennsylvania Avenue, N. W., Washington 25, D. C.

GENTLEMEN:

In compliance with the requirements of Paragraph (B) (ix) of the Findings and Order Issuing Certificate of Public Convenience and Necessity which the Federal Power Commission entered on November 30, 1946 in the Matter of Michigan-Wisconsin Pipe Line Company, Docket No. G-669, the Michigan-Wisconsin Pipe Line Company hereby notifies [fol. 476] the commission that said certificate is acceptable to the Company.

Respectfully, Frank L. Conrad, President.

FLC:CR.

Received, January 13, 1947. Federal Power Commission. Acknowledged January 14, 1947, Secretary.

PLAINTIFF'S EXHIBIT 22

United States of America. Federal Power Commission

Opinion No. 147

In the Matter of MICHIGAN-WISCONSIN PIPE LINE COMPANY

Docket No. G-669

OPINION

By the COMMISSION:

On September 24, 1945, Michigan-Wisconsin Pipe Line Company ("Applicant" or "Michigan-Wisconsin"), filed an application,[1] as amended on March 13,[2] and July 22,[3]

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[1] American Light & Traction Company, parent of Michigan-Wisconsin, had previously, on February 19, 1945, filed an application (Docket G-624) for a certificate of public convenience and necessity authorizing the construction and operation of a natural-gas transmission pipeline extending from a point in the Hugoton Gas Field near Guymon, Oklahoma, to points near Toledo, Ohio, and Detroit, Michigan, and a pipeline from Detroit to the Austin Storage Fields, near Big Rapids, Michigan.

On April 2, 1945, American Light & Traction Company filed an application (Docket G-631) for a certificate authorizing construction of a project similar to that now proposed by Michigan-Wisconsin for serving communities in Missouri, Iowa, Wisconsin, and Michigan.

Subsequent to the filing of the instant application by its Subsidiary, Michigan-Wisconsin Pipe Line Company, the American Light & Traction Company, by order of October 17, 1945, was permitted to withdraw the two applications mentioned above.

[2] The first amendment, among other things, amended the list of communities proposed to be served by certain eliminations in Iowa and certain additions in Wisconsin. It also changed the route and design of the pipelines extending northeasterly from Wisconsin Junction to provide capacity necessary to serve the increased number of communities in Wisconsin.

[3] The second amendment, among other things, further revised the list of communities proposed to be served. It

[fol. 477] 1946, pursuant to Section 7(c) of the Natural Gas Act, as amended, for a certificate of public convenience and necessity authorizing the construction, leasing, acquisition and operation of certain facilities, hereinafter described, for the transportation and sale of natural gas in interstate commerce.

By order of the Commission dated December 5, 1945, the proceeding upon this application was consolidated, for the purpose of hearing, with other certificate proceedings at Docket Nos. G-231, and G-651 (Natural Gas Pipeline Company of America, and Texoma Natural Gas Company), and Docket No. G-664 (Chicago District Pipeline Company).

Hearings were held in Washington, D. C., on January 8 and 9, 1946, during the course of which opening statements were made before the Commission by the several applicants with respect to the issues presented. Subsequently, hearings were held in Chicago, Illinois, commencing on January 14, 1946, on the merits of the applications, other than that of Michigan-Wisconsin, at Docket No. G-669, which was thereafter segregated from the consolidated proceedings.

On May 10, 1946, orders were adopted granting certificates to Natural Gas Pipeline Company of America and Texoma Natural Gas Company (Docket No. G-651), and Chicago District Pipeline Company (Docket No. G-664), authorizing them to increase the capacity of their facilities to supply additional gas to communities then served in Kansas, Nebraska, Iowa, Illinois, and Indiana, and to serve additional communities in Iowa and Illinois. On April 15, 1946, pursuant to the requests of Natural Gas Pipeline Company of America and Texoma Natural Gas Company, the Commission dismissed the joint application of said companies for a certificate of public convenience and necessity with respect [fol. 478] to authorizing the rendition of service to communities in Wisconsin.

Prior to the commencement of hearings upon the merits of the application of Michigan-Wisconsin (Docket No.

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also ~~provided~~ for changes in the route and design of the main transmission pipeline, and proposed changes in the rates and charges at which gas would be sold to Michigan Consolidated Gas Company during the interim period of operation prior to January 1, 1952, and proposes to increase the rate at which gas would be offered for sale on an interruptible basis from 12 to 14 cents per Mcf.

G-669), but subsequent to its intervention therein, Panhandle Eastern Pipe Line Company ("Panhandle") advanced the contention that the Commission was without authority to grant the application of Michigan-Wisconsin and together with other interveners formally moved to dismiss such application without a hearing on the merits.

Argument on the several motions was heard by the Commission in Detroit, Michigan, on April 15, 1946. On the following day, the Commission announced its decision to take the motions under advisement and directed that the taking of evidence on the application of Michigan-Wisconsin should proceed. These hearings upon the merits commenced on April 16, 1946, and concluded on May 3, 1946, when an adjournment was taken.

On March 21, 1946, Panhandle filed with the Commission an application at Docket No. G-706 for a certificate of public convenience and necessity authorizing the construction and operation of certain proposed natural-gas pipeline facilities, designated in the application as Groups "A" and "B", designed to increase the delivery capacity of Panhandle's system to serve existing customers by 10,000 Mcf. per day and 80,000 Mcf. per day, respectively.

Hearings were held at Docket No. G-706 insofar as Group "A" facilities were concerned and a certificate therefor was issued on June 4, 1946. However, upon consideration of the application filed March 21, 1946,[4] and the request of Panhandle for consolidation, the Commission found it appropriate to consolidate Panhandle's application relating to its Group "B" facilities with the proceeding in relation to the application of Michigan-Wisconsin and by its order of April 30, 1946, directed that the proceedings be consolidated for the purpose of hearing. Affirmative evidence of Panhandle was received on May 27-29, 1946.

[fol. 479] On July 1, 1946, Michigan Gas Storage Company filed its application at Docket No. G-731, for a certificate of public convenience and necessity, authorizing the construction, acquisition, and operation of certain natural-gas transmission pipeline and gas storage facilities. Upon the intervention and request of Michigan-Wisconsin the Commission,

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[4] This filing was approximately a year subsequent to the filing by American Light & Traction Company of its original application in Docket No. G-624.

by order of July 19, 1946, directed the consolidation of such matter with the proceedings at Docket Nos. G-669 and G-706, for the purpose of hearing.

Public hearings in the consolidated proceedings were resumed at Washington, D. C., on August 6, 1946, and were continued through November 13, 1946, when the taking of evidence was concluded. Thereafter, oral argument upon the application in Docket No. G-669 was heard by the Commission, commencing on November 20, and concluding on November 23, 1946. Michigan-Wisconsin, Panhandle, and various other interveners filed written statements or briefs in support of their oral argument. In addition, Panhandle filed a memorandum in support of its motion to dismiss the application of Michigan-Wisconsin.

Among the participants and interveners actively represented in the proceedings were the Public Service Commissions of Michigan and Wisconsin, the State Corporation Commission of Kansas, the City of Detroit, and Panhandle Eastern Pipe Line Company. Other state and city interveners were the Corporation Commission of Oklahoma, Public Service Commission of Missouri, Illinois Commerce Commission, and the City of Dearborn, Michigan; in addition, there were also other participants and interveners, including several natural-gas companies, local distribution companies, and numerous associations representing coal, railroad and labor interests, as shown below.[5]

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[5] Public Service Commission of Indiana; City of Milwaukee; Natural Gas Pipeline Company of America; Northern Natural Gas Company; Cities Service Gas Company; Consumers Power Corporation; Wisconsin Public Service Corporation; Central Indiana Gas Company; Indiana Gas & Water Company, Inc.; Battle Creek Gas Company; National Utilities Company of Michigan; National Coal Association; Wisconsin-Upper Michigan Fuel Dealers Association; Solid Fuel Institute of Milwaukee County; Central Illinois Coal Operators Committee; Illinois Coal Traffic Bureau; Middle States Fuels, Incorporated; Northern Illinois Coal Trade Association; Coal Trade Association of Indiana (intervention subsequently withdrawn); Pocahontas Operators Association; Winding Gulf Operators' Association; Western Railroads; thirty-three individual railroad companies; Lake Michigan Docks Association; United Mine Workers of

[fol. 480] Jurisdiction

Michigan-Wisconsin Pipe Line Company will be a natural-gas company within the meaning of the Natural Gas Act, as amended, upon completion of the construction of the proposed facilities and the operation of such facilities for the transportation of natural gas in interstate commerce and the sale of gas in interstate commerce for resale.

The construction and operation of the facilities proposed to be constructed by the Applicant, and the operation of facilities of others to be leased by Applicant, all for the purposes of such transportation and sale for ultimate public consumption, are subject to the jurisdiction of this Commission and the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act, as amended.

Proposed Project

Michigan-Wisconsin proposes the construction of a 26-inch pipeline from a point in Hansford County, Texas, and extending for 810 miles through the States of Oklahoma, Kansas, Missouri, Iowa and Illinois, to a point near Millbrook, Illinois, referred to as Wisconsin Junction. From this point a 22-inch pipeline will extend for 259 miles in an easterly and northeasterly direction through the States of Indiana and Michigan to the terminus of the main transmission line at the Austin Storage Field, near Big Rapids, Michigan.

America; Order of Railway Conductors, Brotherhood of Locomotive Firemen and Enginemen; Switchmen's Union of North America; Brotherhood of Locomotive Engineers; Associated Coke Plant Employees; International Chemical Workers Union Local No. 152; Coal Yard Employees Union Local No. 239; Coal & Ice Drivers & Helpers Local Union No. 257, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Wisconsin Driver's Conference; International Association of Machinists Lodge No. 66; Firemen and Oilers Local No. 125; Electrical Workers' Union Local No. 494; Operating Engineers' Union Local No. 311; Painters' Consolidated Local Union No. 781; Boilermakers' and Helpers Union Local No. 107; United Mine Workers of America, District No. 12.

From Wisconsin Junction a 22-inch pipeline will be constructed in a northerly direction for 101 miles to a point near Milwaukee, Wisconsin, referred to as Milwaukee Junction. [fol. 481] From the latter point an 18-inch pipeline will extend for 11 miles to the Milwaukee area, and a 14-inch pipeline will extend for 59 miles to a point near Appleton. Branches from the 14-inch line will extend to Sheboygan, Fond du Lac, Oshkosh, Manitowoc, Two Rivers, Appleton, and Green Bay. A 12-inch branch line will extend from the 22-inch line to Racine, and a 10-inch line to Madison. The latter will have laterals extending to Janesville, Beloit and Stoughton, Wisconsin. The branch lines serving Wisconsin will total 422 miles of pipe, ranging in diameter from 22-inch to 4½-inch.

Lateral lines will extend from the main 26-inch line to Maryville, Missouri, and to Mt. Pleasant, Burlington, Fort Madison, and Keokuk, Iowa. These branch lines will total 93 miles of pipe ranging in diameter from 6⅝ to 2⅜-inch.

Initially Applicant will construct a compressor station of 7,800-horsepower in Hansford County, Texas, to be located at the point of commencement of the main transmission pipeline, and main line compressor station No. 8 of 7,800 horsepower to be located near Mt. Pleasant, Iowa.

The facilities to which reference has been made comprise the "initial construction" necessary to the beginning of transmission and sales operation.

During the first four years of operation Michigan-Wisconsin proposes to construct additional facilities, primarily compressor stations, to increase the delivery and sales capacity of the line. It is intended that the main pipeline to the Austin Storage Field, when fully powered, will have a total of 13 compressor stations aggregating 130,500 installed horsepower.

In addition to the facilities it proposes to construct, Applicant proposes also to operate under lease facilities, both presently constructed and to be constructed, owned by others. Michigan Consolidated Gas Company ("Michigan Consolidated"), an affiliate of Michigan-Wisconsin, now owns facilities and rights in the Austin and Reed City Storage Fields in Michigan which are to be used for the storage of natural gas. Pursuant to a contract of December 4, 1945, between these parties, Applicant proposes as a part of its project [fol. 482] to lease and operate these fields for gas storage

purposes, together with certain transmission pipelines and metering stations now owned by Michigan Consolidated. Michigan-Wisconsin seeks approval of such lease arrangement and requests a certificate authorizing the operation of these facilities. Approval is also sought for the acquisition of such facilities on or about December 31, 1951.

In addition to the facilities now in service in the proposed storage fields, Michigan consolidated proposes to construct other facilities, including additional wells and field lines in the Austin and Reed City Fields necessary to the contemplated storage operations. These facilities are also to be leased and operated by Applicant, and to be subsequently acquired, and Michigan-Wisconsin seeks approval for such lease and operation and subsequent purchase arrangements.

Under the terms of the said agreement of December 4, 1945, certain facilities are to be constructed by a wholly-owned subsidiary of Michigan Consolidated, known as the Austin Field Pipe Line Company ("Austin Field Company"). It is intended that this company shall construct and own a 26-inch natural-gas transmission pipeline extending approximately 140 miles from the Austin Storage Field to a point at or near Detroit, Michigan, where the gas will be delivered into the system of Michigan Consolidated, and also lateral pipelines for serving the Mt. Pleasant and Ann Arbor districts of Michigan Consolidated. Among other things, the Austin Field Company will construct a pipeline between the Reed City and Austin Storage fields and a compressor station in the latter field. It is proposed that these facilities also be leased and operated by Applicant, and corresponding authorization is sought. Applicant also requests approval of the acquisition of such facilities on or about December 31, 1951. Such of the proposed facilities which Michigan Consolidated and Austin Field Company propose to construct and lease to Michigan-Wisconsin, which are subject to the jurisdiction of the Commission, require the filing of appropriate applications and authorizations by this Commission. Our order of November 30, 1946, issuing a certificate of public convenience and necessity, is therefore conditioned so as to prohibit the transportation or sale of natural gas subject to the jurisdiction of the Commission by means of Applicant's proposed facilities, unless and until applications have been made to this Commission to authorize the construction and operation of such facilities.

[fol. 483]

We believe it is inappropriate to authorize now the future acquisition of facilities as outlined by the Applicant in its application from its subsidiaries, Michigan Consolidated and Austin Field Company, as of December 31, 1951, which in the interim period prior to that date are to be leased to Michigan-Wisconsin. Such approval at this time is premature and unnecessary. Such action by the Commission is without prejudice to the Applicant's filing a more timely application with respect to such proposed acquisition.

For a more detailed description of the facilities included in the application and comprising the entire project pipeline and storage system, reference is made to the application and exhibits pertaining thereto.

The proposed project has a distinct and readily recognizable advantage over the ordinary interstate natural-gas transmission pipeline system. This advantage lies in the fact that the project combines the operations of a high-pressure pipeline with the utilization and operation of large gas fields for underground storage purposes. This combination of transport and large scale storage facilities makes possible important economies in operation, permits flexibility and superior reliability of service, and enables a high load factor operation of the main pipeline system.

The main pipeline facilities to be constructed initially by Applicant will provide a capacity of 132,000 Mcf. at the Hugoton field compressor station. The maximum sales capacity during the first year of operation will be 130,000 Mcf. per day, and 47,450,000 Mcf. per year. Estimated average daily sales in this first year are 127,989 Mcf. or a total of 46,716,000 Mcf. for the year.

The record indicates that in the first year of operation the winter peak day requirements of the Wisconsin, Iowa and Missouri markets will be 111,000 Mcf., which will leave approximately 19,000 Mcf. available directly from the pipe- [fol. 484] line for the supply of Michigan markets. It will be necessary therefore that practically all of the estimated peak day demand upon Applicant (165,000 Mcf.) for the supply of the Michigan markets be taken from the storage fields.

In the fifth year of operations the fully powered main pipeline facilities will have a capacity of 325,000 Mcf. per day at the Hugoton compressor station outlet. The designed sales capacity will then be about 303,000 Mcf. daily. If operated at full load, the annual sales capacity of these facilities

would be 110,595,000 Mcf. This would more than adequately provide for estimated firm gas requirements in the year of 90,762,700 Mcf. More than 19,000,000 Mcf. would then be available for storage and interruptible sales, or to satisfy any underestimates of firm demands.

The record indicates that the winter peak day requirements of the Wisconsin, Iowa, Missouri markets in the fifth year will be 205,000 Mcf. The balance of 98,000 Mcf. will flow directly from the pipeline to supply Michigan markets. In addition, 299,000 Mcf. will be withdrawn from storage to meet the peak day demands of the Michigan markets in that year, estimated to be 393,000 Mcf. Practically the entire peak demands of the Detroit, Ann Arbor, and Mt. Pleasant districts, which are estimated to be 301,000 Mcf., will be met from the storage fields. The combined total of sales requirements, fuel, and losses on the estimated peak day will be approximately 624,000 Mcf. or almost double the capacity of the pipeline system.

The Applicant proposes to use for storage purposes the Austin and Reed City Fields, which fields have a working capacity adequate to meet the demands upon them for a reasonable period in the future. Should future expanding operations necessitate additional storage capacity, Applicant can, if authorized, acquire the Goodwell Field which is now within the control of Michigan Consolidated.

It is our opinion that the capacity of the project as designed is adequate to fulfill the requirements of the markets proposed to be served for a reasonable period in the future.

[fol. 485] Proposed Service

Applicant proposes to bring natural gas to areas that do not now have such service and also to an area where Applicant's proposed service will enter into competition with the operations and business of Panhandle. From the initial point on its pipeline in Northwestern Texas, Applicant proposes to build its pipeline and facilities through the States of Texas, Oklahoma, Kansas, Missouri, Iowa, Illinois, Wisconsin, Indiana, and Michigan, and to sell natural gas at wholesale to distributing companies now supplying manufactured gas in certain communities in Missouri, Iowa and Wisconsin, and to Michigan Consolidated Gas Company which serves many communities in Michigan, some with natural

gas produced in Michigan, and some with natural gas purchased from Panhandle and supplemented by manufactured gas.

Applicant has entered into a contract with Michigan Consolidated to provide for its natural-gas requirements after the expiration of that company's contract with Panhandle on December 31, 1951. If natural-gas service should become available by means of Applicant's proposed facilities prior to the end of 1951, it is proposed that Applicant will furnish all of Michigan's Consolidated's requirements in excess of the 127,000 Mcf. per day which Panhandle may now be called upon to furnish under the terms of its contracts for the Detroit and Ann Arbor districts. Applicant also proposes to serve Michigan Consolidated's requirements for the company's so-called Western Districts, which are now supplied with gas from local fields in Michigan.

Taking a comprehensive view of Applicant's proposed facilities and service it is to be noted that Panhandle and Applicant upon completion of its project will operate in the following States: Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana, and Michigan. Substantial conflict of interests between the two companies, however, are present only in the Detroit and Ann Arbor areas of Michigan.

The evidence concerning the future requirements of the markets proposed to be served by Applicant stands uncontroverted in the record. Such estimates represent largely [fol. 486] the opinions of officers of the distributing companies which Applicant will supply or are the opinions of engineers well qualified by long experience in the preparation of such estimates. The market requirement and growth estimates were first based on the assumption that the project would commence operations by 1948. Accordingly 1948 would be the first full year of operations and 1952 would be the fifth such year.

It is clear on the record that the proposed pipeline system of Michigan-Wisconsin cannot be constructed and in operation by 1948. Nor can a definite date be now fixed. This is because of the large backlog of orders which steel pipe manufacturers now have on their books, requiring full capacity of production for many months to come. This tight situation is further aggravated by the fact that steel pipe mills are now unable to produce at full capacity because of the insufficient supply of steel plate required for rolling pipe.

Two of the important markets proposed to be served by Applicant which now have natural gas service are Detroit and Ann Arbor. As noted, the supply of natural gas for distribution in these areas is presently obtained from Panhandle, and such supply is supplemented in peak periods with gas manufactured by Michigan Consolidated. The total sendout in the Detroit area in 1945 was 32,457,400 Mcf., of which 32,089,500 Mcf. were supplied by Panhandle, the balance being manufactured gas. Peak-day delivery during the 1945-46 season was 151,400 Mcf., of which 127,300 Mcf. represented Panhandle deliveries. It was also estimated that the total annual deliveries during the year 1946 would exceed 38,000,000 Mcf. It was estimated during the course of this proceeding that the maximum day requirements of the 1946-47 season would be approximately 197,000 Mcf., of which 125,000 Mcf. would be supplied by Panhandle and the balance of 72,000 Mcf. by manufacturing facilities of Michigan Consolidated, the latter figure being the estimated maximum production of such facilities, including a recently installed liquid petroleum gas plant.

In 1951, it is estimated, the annual requirements of firm consumers in the Detroit district will be in excess of 43,000,-[fol. 487] 000 Mcf., including company use and unaccounted for gas, and there will be a market for 27,000,000 Mcf. proposed to be sold on an interruptible basis, or a total of 70,000,000 Mcf. Additional testimony by the president of Michigan Consolidated, however, was to the effect that there would be a large and ready market for firm gas sales to industry, not only of the 27,000,000 Mcf. proposed to be sold on an interruptible basis, but for an additional 16,500,000 Mcf. per year, or a total of 43,500,000 Mcf. If these additional industrial sales are made, the total gas requirements of the Detroit district in 1952 are estimated to be approximately 87,000,000 Mcf. The peak day demand in the year 1952 would be 287,000 Mcf., plus the demand for such portion of the 43,500,000 Mcf. additional industrial markets as is sold on a firm basis.

The total annual requirements of the Ann Arbor district in the year 1945 were 449,800 Mcf. with a peak day demand of 2,150 Mcf. It is estimated that these requirements will increase to a total of 936,300 Mcf. in 1952, and that the peak day demand during the 1952-53 season will be 6,900 Mcf. All sales will be on a firm basis as no interruptible sales

are made in the Ann Arbor district nor are any contemplated in the future.

The so-called Western Districts served by the Michigan Consolidated include the Grand Rapids, Muskegon, Mt. Pleasant, Big Rapids, and Greenville-Belding areas. Since the introduction of natural-gas service to these areas, supplies have come from the local Michigan producing fields. There is evidence that such sources of supply are rapidly becoming depleted. They are not expected to satisfy the requirements of these markets even on a restricted sales basis beyond the year 1948. Accordingly, the distributing company is seeking a new source of supply to enable it to continue to render service to these markets.

The total annual demand in the year 1945 for the Western District was 7,222,100 Mcf. with a peak day demand of 41,120 Mcf. These demands are expected to show a great increase. In 1952 the annual requirements were originally estimated to be approximately 12,444,400 Mcf. and the peak demand during the 1952-53 winter season to be 99,000 Mcf. [fol. 488] To this should be added 1,500,000 Mcf. representing additional annual firm industrial sales for which the president of Michigan Consolidated testified there is a market. Natural gas has not been previously sold on an interruptible basis in the Western Districts. Nor are such sales contemplated in the future.

In Wisconsin natural gas is not now available in the communities Applicant proposes to serve if its project is authorized. Each of these communities is presently served with manufactured gas.

Applicant has entered into contracts with the Milwaukee Gas Light Company and the Madison Gas and Electric Company, both of them affiliates, for the supplying of all requirements of gas after the contract becomes operative upon the completion of Applicant's project.

In the first year of Applicant's operations the demand in the Milwaukee area is estimated to be 9,756,000 Mcf. with a peak day requirement of 58,200 Mcf. In the fifth operating year the annual demand is expected to reach 18,375,000 Mcf., with a peak day requirement of 112,100 Mcf.

In Madison, one of the largest markets proposed to be served in Wisconsin, it is estimated that sales of natural gas in the first year of operation would amount to 942,000 Mcf., and that the peak day requirement in the first full winter

season would be 5,800 Mcf. This market is expected to increase to an annual requirement of 1,482,000 Mcf. in the fifth operating year with a peak day demand of 10,100 Mcf. for the 1952-53 season.

Other Wisconsin communities proposed to be served by Applicant are Racine, Beloit, Janesville, Green Bay, Sheboygan, Appleton, Neenah, Menasha, Oshkosh, Fond du Lac, Manitowoc, Two Rivers and Stoughton and their vicinities. Contracts have not been entered into with the distributing companies serving these last-named communities. However, officers representing several of these distributing companies voluntarily appeared in this proceeding for the purpose of indicating their desire to obtain natural gas for distribution in and in the vicinity of the communities served by such distributors. They further indicated a willingness [fol. 489] to contract for such service on the basis of the terms and conditions contained in the contract between Applicant and the Madison Gas and Electric Company, which, according to the president of Michigan-Wisconsin, represents a standard form of agreement to be entered into with any distributing company other than those for which contracts have heretofore been made for natural gas service.

It is estimated by Applicant's witnesses that during the first year of operation of the proposed project the total demands of all Wisconsin markets, including Milwaukee and Madison, will be 18,531,000 Mcf., with a peak demand during the first full winter season of 107,700 Mcf. It is estimated that the annual requirements during the fifth year of operation of the proposed project, assumed to be 1952 in the exhibit, will be 32,541,000 Mcf. and that the peak day demand during the fifth year winter season will be 198,300 Mcf.

In Iowa Applicant proposes to introduce natural gas into the Mt. Pleasant, Burlington, Fort Madison, and Keokuk markets. Each of these markets is presently served with manufactured gas. Applicant has not as yet entered into contracts with the distributing companies serving such markets.

Evidence indicates estimated annual requirements of these four communities in the first and fifth years of operation of the proposed project to be 468,000 Mcf. and 883,000 Mcf., respectively, with respective peak day demands

during the first and fifth winter season of 3,040 Mcf. and 6,070 Mcf. All deliveries will be firm.

In Missouri Applicant proposes to serve the town of Maryville. A contract has been made with the Maryville Electric Light and Power Company, an affiliate, for such service. As noted previously, this community is now served with manufactured gas. It is estimated that the annual demand for this market in the first year of operation will be 42,000 Mcf., and 76,000 Mcf. in the fifth year of operation. Estimates as to peak day requirements in the first and fifth years of operations are 270 Mcf. and 550 Mcf., respectively.

Until such time as the present contract with Panhandle expires on December 31, 1951, the evidence as to demands to [fol. 490] be made upon the Applicant for service in the Detroit district assumes a daily delivery of 125,000 Mcf. by Panhandle. Similarly, the evidence assumes that during such period Panhandle will deliver a maximum of 2,000 Mcf. per day in the Ann Arbor district.

Assuming such deliveries by Panhandle and assuming also that Applicant's project will be in operation prior to the expiration of the contract between Michigan Consolidated and Panhandle the total firm demands of all markets upon the Applicant's facilities during the first year of operation (assumed to be 1948 in this record) will be 45,716,000 Mcf. and a peak day delivery requirement during the first winter season of 276,000 Mcf. For the fifth year of operation, which will be after the expiration of the present contract with Panhandle, it was originally estimated that total annual sales would be 108,762,000 Mcf., of which 18,000,000 Mcf. would be sold on an interruptible basis and 90,762,000 Mcf. on a firm basis. On the bases of the testimony of the president of Michigan Consolidated as to additional markets for industrial sales in Michigan, firm requirements increase by 45,000,000 Mcf. to 135,762,000 Mcf., interruptible requirements decrease from 18,000,000 Mcf. to 5,000,000 Mcf., and total requirements are 140,762,000 Mcf. or 32,000,000 Mcf. more than originally estimated. Total peak day demand of firm sales in the fifth year was originally estimated to be 598,000 Mcf., but would be increased if the additional industrial sales indicated above were made on a firm basis. Further the record shows that contracts for the sale of natural gas to Mich-

igan Consolidated Gas Company, Milwaukee Gas Light Company, Madison Gas and Electric Company, and Maryville Electric Light and Power Company cover at least 85 per cent of the sales to be made by Applicant in the fifth year of operation.

Applicant's evidence as to available and potential markets was thorough, convincing and, we think, conservative. It was left substantially uncontroverted. For the purposes of our decision we accept such market estimates as reasonable and as sufficient to justify and support the proposed project in furtherance of public convenience and necessity of the general public in the areas proposed to be served.

[fol. 491] Gas Supply

Applicant proposes to receive its supply of gas from certain portions of the Hugoton Field located in Oklahoma and Texas. Under the terms of a contract of December 11, 1945, with the Phillips Petroleum Company ("Phillips"), there is dedicated to the Applicant gas to be produced from acreage owned or controlled by Phillips in such field.

The record shows that Michigan-Wisconsin prior to the hearing on its application, was advised by its geologist and principal witness on gas supply that it was desirable for it to augment its gas supply in order to insure fully the fulfillment of the requirements contemplated by Applicant under the proposed project. By reason of negotiations undertaken by Applicant, additional gas acreage was dedicated to it.

According to Applicant's Witness Davis, the gas available may approximate or exceed 4,000 billion cubic feet, thus enabling Michigan-Wisconsin to obtain 100 billion cubic feet of deliverable gas per year for approximately 25 years, with smaller annual rates of delivery thereafter. This witness also testified that of a total of 633,460 acres dedicated to Applicant under the Phillips contract, 436,940 acres[6] may be classified "as essentially proven for commercial production" and that an additional 73,010 acres should be classified as marginal, with a remainder of the dedicated acreage lying beyond the limits of the field.

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[6] Approximately 325,820 acres being under lease to Phillips, and 110,960 acres being under contract with other producers.

Applicant's Witness Biddison testified that the dedicated acreage is capable of delivering 130,200,000 Mcf.[7] annually for a period of 17 years without exceeding the present statutory maximum daily allowable, which is 25 per cent of the open-flow potential. Beyond the 17-year period, according to this witness, deliveries in equivalent volumes would necessitate the taking of gas at a higher percentage [fol. 492] rate of the open-flow potential. Of course, the acquisition of additional reserves in the future which is the practice of the larger pipeline companies, including Panhandle, as operating experience demonstrates the need, would lengthen the life of the combined reserves regardless of which estimate is considered the most reliable.

Panhandle's Witness Murrell estimated 405,120 acres of the dedicated acreage to be capable of producing natural gas in commercial quantities with recoverable reserves of 1,982 billion cubic feet above an abandonment pressure of 65 p.s.i., the same pressure as that used by Applicant's Witness Davis. Murrell's estimate, it will be noted, amounts to slightly less than one-half of Davis' gas reserve estimate. An explanation of this wide discrepancy is found in the dissimilarity of estimating methods used by the respective witnesses. Davis used the volumetric method of determination while Murrell adopted a method of comparing unproduced wells with wells of similar characteristics of which there is a known history of production. In Murrell's method, the geological and physical characteristics of each well drilled on the dedicated acreage was ascertained and a comparison was made with comparable producing wells in the so-called "Hansford Block" of dedicated acreage.[8] The unproduced wells in the dedicated area were then assumed to be capable of producing in the same manner and extent as the comparable wells in the "Hansford

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[7] 130,200,000 Mcf. being the annual volume of production estimated as required to deliver to Michigan-Wisconsin a daily average volume of 334,000 Mcf. and a peak day volume of 343,000 Mcf. which is the maximum of Phillips' obligation under the contract.

[8] This acreage is situated in the extreme south of Texas County, Oklahoma, and the extreme north of Hansford and Sherman Counties, Texas, being contiguous to the state boundary line.

Block." On these assumptions Murrell subdivided the dedicated acreage into areas wherein he believed the gas-bearing formations would be similar to those in the "Hansford Block." By applying reserves per acre determined for the "Hansford Block" by the pressure-decline method to comparable acreage in the dedicated area, the gas reserves in the latter area were estimated.

The estimates of the Witness Murrell are based upon a production history of wells, where the oldest well has been producing gas for a period of two years only. This is not [fol. 493] a sufficient history upon which an estimate of reserves on the pressure-decline basis can be made to the extent that we can find it to be the most reliable method of estimating gas reserves. It is interesting to note that in presenting estimates of reserves to support its application in the companion case in Docket No. G-706, Panhandle's production engineer chose the volumetric rather than the pressure-decline method of estimating reserves for the "Hansford Block."

Witness Davis has made numerous studies of gas reserves in the Panhandle Field of Texas and in the Hugoton Field and has made studies for practically all natural-gas companies, including Panhandle in that field. His investigations and studies, in connection with this application, began about August, 1945, and continued until the time of his testimony. In making his estimates of reserves by the volumetric method in the dedicated area, Witness Davis had the benefit of all data available for this purpose in the Hugoton Field including the geological information on this area in the possession of the supplier, Phillips Petroleum Company.

Witness Murrell, who testified in rebuttal of Davis' testimony, based his conclusions on the relatively brief period of approximately two months of survey and preparation of his report, in addition to other data made available to him. We believe that his method of estimating gas reserves in the dedicated area cannot be said to be more reliable than the method used by Davis.

Recognition, of course, must be given to the difficulties encountered in preparing estimates of reserves on such a large amount of acreage when only 36 wells had been drilled thereon, and that divergent views might result from the study of such data. Further, we are not unmindful of the fact that there is a possibility of error in either or both of

the reserve estimates submitted. However, the possibility of error is inherent in any estimate of this nature, since they must of necessity be built largely upon basic factors determined by individual judgment.

We have carefully weighed the estimates in the record in order to reach conclusions as to the sufficiency of the gas supply committed to this project. In evaluating the evidence as to gas reserves it is not realistic to attempt a deter- [fol. 494] mination of the precise or exact volumes of gas available to a proposed project. Rather we are called upon to determine whether the available gas supply is sufficiently adequate to support the project for which a certificate of public convenience and necessity is authorized. Upon consideration of all of the evidence pertaining to gas supply in this record, we conclude that the gas supply available to Applicant and dedicated to the service Applicant proposes to render are adequate to supply and support the facilities which we find should be authorized.

Rates

The availability and use of the Austin and Reed City Storage Fields will enable economies to be effected and assure a high load factor for the main pipeline operation. Applicant proposes to reflect these advantages of the project in the rates to be charged.[9]

A block type of rate structure for firm gas sales in Iowa, Missouri and Wisconsin from the time of commencement of operations, and in the Michigan market area after 1951, is proposed as follows:

For the first 400,000 cubic feet per month, per thousand of population delivered for use in an operating district of buyer, 25 cents per Mcf.

For the next 600,000 cubic feet per month per thousand of population delivered for use in an operating district of buyer, 20 cents per Mcf.

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[9] In its memorandum filed at the time of oral argument, Applicant stated that by its proposed form of rate it would "give the benefit of the storage aspects of this project to the customers which it proposes to serve from the project, and these rates will result in the lowest cost ever proposed from a project of this magnitude for daily firm gas service to distributing companies."

All gas in excess of 1,000,000 cubic feet per month, per thousand of population delivered for use in an operating district of buyer, 15 cents per Mcf.

These rates are to be applied to all sales of firm gas delivered at the city gates in the various market areas to be served. Applicant, in order to make these rates equitable [fol. 495] and non-discriminatory, proposes to base block population of market areas on the official United States census reports. In instances where the population of certain communities to be served by a distributing company is not available, such population is to be estimated in a manner to be specified in the contract between Applicant and the distributor. Populations once determined for the purposes of these rates are to remain constant until such time as official United States census reports indicate a change of 10 per cent in the population of the market area served, or until a change in the territory served by the distributor necessitates a new determination of the population of the market served.

Applicant urges that this form of rate will give the consumer the full benefit of the storage features of its project. The use of storage fields as proposed, it is said, will permit the utilization of the transmission pipeline facilities in substantially a 100 per cent capacity or load factor and that, accordingly, it is not necessary to determine and fix a demand charge as is ordinarily contained in a so-called two-part rate.

A further advantage claimed by Applicant on behalf of its proposed form of rate is that it permits a full development of space-heating sales by the distributor without the penalty which normally is imposed on such sales in other types of rates because of the seasonal variation in the load. Applicant points out that the proposed rates, by being related to the population factor, regardless of rate class, will benefit all consumers, because, as the volumes of gas purchases increase, the average rate decreases.

Interruptible sales of gas by Applicant are proposed to be made at a flat rate of 14 cents per thousand cubic feet.

From the time of commencement of operations of the proposed project until the expiration of the contract on December 31, 1951, between Panhandle Eastern and Michigan Consolidated, Applicant will be able to deliver only a portion of the gas requirements of the Michigan markets but

will be able to put into underground storage considerable quantities of gas which will subsequently be available for Michigan Consolidated and other Michigan markets. Ac- [fol. 496] cordingly, Applicant has devised special rates and charges for the sales to Michigan Consolidated during this interim period. It is proposed that Michigan Consolidated pay an annual fixed charge of $1,300,000, plus 14 cents per Mcf. of gas delivered to that company.

The amount of $1,300,000 represents fixed charges and taxes payable on those facilities which are to extend east of the Wisconsin Junction and which, in Applicant's opinion, during the interim period are to be utilized solely for the benefit of the Michigan markets. The rate of 14 cents per Mcf. of gas delivered is the same as that fixed for interruptible sales in other market areas, since Applicant considers the sales to be made to Michigan Consolidated during the interim period to be in the nature of interruptible sales.

Due to the unusual form of rate proposed further study should be given to this matter both by the Commission and by the Applicant to determine whether the proposed rates or some other form of rates will assure the lowest reasonable ultimate consumer charges and at the same time give to the distributing companies an incentive for the sound expansion of their gas utility business. Since the proposed facilities of Applicant will not become operative until some time in the future, Applicant should be permitted a reasonable time for further study of a rate schedule, or schedules, adequate to meet the reasonable cost of service consistent with the public interest. We have therefore conditioned our order to the extent that Applicant submit a schedule of rates satisfactory in form to the Commission within six months from the issuance of the certificate.

Project Costs—Revenues

It is estimated by Applicant that the total investment in the initially proposed facilities at the time of commencement of operations will be $52,618,823, including an allowance of $500,000 for working capital. The following tabulation shows the total fixed transmission capital, working

capital and depreciation, at the beginning and end of the years indicated, and the total net investment:

[fol. 497]

	Second Year	Third Year	Fourth Year	Total Investment 5th Year
Total Fixed Capital at beginning of year	$54,787,364	$57,329,463	$58,219,529	$84,219,573
Working Capital	550,000	635,000	700,000	1,350,000
Total	$55,337,364	$57,964,463	$58,919,529	$85,569,573
Annual Depreciation	$ 1,643,621	$ 1,719,884	$ 1,746,586	$ 2,530,567
Net Fixed Capital at end of year	$52,130,179	$53,087,394	$52,245,874	$76,365,351

The initial construction includes the main line from the Hugoton Field to the Austin Field in the State of Michigan and branch lines in Wisconsin as well as the laterals in Missouri and Iowa. The first two compressor stations will be constructed in the Hugoton Field and on the line at "Station No. 8" with an initial capacity of 7,800 horsepower in each station. During each of the first, second, and third years of operations, Applicant proposes to construct additional compressor stations along the route of its pipeline project and install additional facilities in stations constructed in prior years in order to meet increased requirements of the markets it proposes to serve. It is estimated that the cost of these additions in the respective years will be $2,718,541, $2,627,099, and $955,066. In the fourth year, Applicant proposes to construct six new compressor stations along its main line, to make substantial additions to stations previously constructed along its main line, and to construct a compressor station in the Reed City Storage Field in Michigan. The additions to be made during the fourth year are estimated to cost $15,050,072. In the fifth year, at the end of the so-called "interim period", Applicant will construct additional stations, Nos. 1, 3, 5, 7, and 9, with an installed capacity of 9,000 horsepower each, and station No. 12 with an installed capacity of 7,000 horsepower. In the Hugoton Field station 77,700 horsepower will be added and additional [fol. 498] horsepower will be supplied in several of the line stations.

At the end of the interim period on December 31, 1951, the expiration date of the present contract between Panhandle and Michigan Consolidated, Applicant proposes to

acquire from Michigan Consolidated and its subsidiary, the Austin Field Pipe Line Company, the Austin and Reed City Storage Fields, together with certain facilities now constructed or to be constructed therein, and certain other pipelines in the State of Michigan now constructed or to be constructed by the sellers. The cost of such facilities to Applicant, under its contract with Michigan Consolidated, is to be based upon the original cost of such facilities, less accrued depreciation at the time of transfer, a total estimated cost of $11,599,972. The facilities to be transferred include a new 24-inch line between the Austin and Reed City Storage Fields, and approximately 140 miles of 26-inch line from Austin Field to Detroit with laterals to serve Mt. Pleasant and Ann Arbor.

It is estimated that by the end of fifth year, the completed project, including construction and acquisitions, will have required a total investment by Applicant of $85,569,573, and will represent a depreciated investment of $76,365,351. According to the record, Applicant expects to realize, after all operating costs, at the end of the first year of operations, a net return of about 4.67 per cent upon its net investment and making allowance for Federal Income Tax at the presently effective rates. A net return of 6.04 per cent is estimated at the end of the fifth year of operations.

The cost estimates contain substantial allowance for contingencies and overheads (13.9 and 10.4 per cent, respectively, on total capital cost). Depreciation is calculated in the investment and operating expense estimates at the rate of 3 per cent per year, reflecting a weighted-average life estimate of all depreciable property of 33 years. Detailed operating revenue and expense estimates are in evidence for each of the first five years of operation. Tabulation below summarizes the five-year operating forecast, as follows:

[fol. 499] "Five-Year Operating Forecast (Revised as of August, 1946)."

1948	1949	1950	1951	1952
Total Gas Sold in *MMcf.*				
46,716	62,121	69,258	74,653	108,762
Total Utility Revenue				
$ 9,167,900	$11,397,940	$12,441,760	$13,226,070	$19,261,650

1948	1949	1950	1951	1952
Total Revenue Deductions Before Federal Income Tax				
$ 5,987,000	$ 7,124,000	$ 7,866,000	$ 8,330,000	$12,649,000
Federal Income Tax				
$ 794,922	$ 1,217,497	$ 1,343,589	$ 1,478,607	$ 2,000,187
Net Utility Income				
$ 2,385,978	$ 3,056,443	$ 3,232,171	$ 3,417,463	$ 4,612,463
Interest on Debt				
$ 1,089,000	$ 1,070,000	$ 1,040,000	$ 1,005,000	$ 1,349,000
Net Income				
$ 1,296,978	$ 1,986,443	$ 2,192,171	$ 2,412,463	$ 3,263,463
Net Fixed Capital at End of Year				
$51,055,259	$52,130,179	$53,037,394	$52,245,874	$76,365,351
Return on Next Fixed Capital at End of Year				
4.67%	5.86%	6.69%	6.54%	6.04%

The operating estimate for the fifth year of operation (assumed to be 1952 in the estimate) shows an expected population served by the entire project of 3,723,000. It shows total firm gas sales of 108,762,000 Mcf. and a total revenue from such sales of $19,261,650, or an average revenue of 17.71 cents per Mcf. of gas sold.

Estimates of project costs are predicated largely on quotations from manufacturers of material and equipment. Otherwise they represent the judgment of a firm of consulting engineers experienced in pipeline construction and operation as do estimates with reference to operating expenses. [fol. 500] It is recognized that the estimates with respect to future project costs and operating expenses in these times of rapidly changing prices and economic conditions are subject to change. Labor costs also are subject to fluctuations. Not only this project, but all future construction and operation will be affected by these changing costs and employment conditions and the Commission recognizes their impact.

We consider Applicant's estimates adequate and reasonable as of the time of preparation and accept them as reasonable and adequate for the purposes of this proceeding.

Financing

The initial financing of the proposed project contemplates the issuance and sale of the following securities:

$ 5,700,000	2% 5-Year Serial Notes, to be retired over 3½ years (first maturity 2 years from date of issue).
30,000,000	3¼% 20-Year First Mortgage Bonds, to be retired through sinking fund over 15 years (first maturity 5½ years from date of issue).
17,000,000	Common Stock.
$52,700,000	

Applicant proposes to finance project additions to be made during the first, second and third years of operation from current cash accruals and in part from accruals for depreciation.

Construction and acquisitions to complete the proposed ultimate project are, according to the record, to be financed by the issuance of the following securities during the fourth year of operation:

$14,000,000	5% Preferred Stock, to be retired through sinking fund over 20 years (first maturity 5½ years from date of issue).
12,000,000	3¼% 20-Year First Mortgage Bonds to be retired through sinking fund over 20 years (first maturity ½ year from date of issue).
$26,000,000	

It is intended that the common stock to be issued as a part [fol. 501] of the initial financing will be sold to Michigan Consolidated; the board of directors of the company have adopted a resolution authorizing such purchase of stock.

The record also discloses that in order to finance the purchase by Michigan Consolidated of $17,000,000 of common stock proposed to be issued in the initial financing by Michigan-Wisconsin [10] it will be necessary that the former company issue and sell an equivalent amount of stock.

[10] Michigan-Wisconsin and Michigan Consolidated are both subsidiaries of American Light and Traction Company.

Although Applicant did not submit firm proof with respect to the purchase of the foregoing securities, in explanation thereof it was stated:

Since Applicant's parent, the American Light and Traction Company, is a regulated holding company, the proposed financing is subject to the requirements of the Securities and Exchange Commission prescribed under the Public Utilities Holding Company Act. Accordingly, the usual pattern of financing ordinarily presented by applicants before the Federal Power Commission cannot be followed by the Applicant in this proceeding. Rule U-50 of the S. E. C. requires competitive bidding on the issuance of securities by holding companies or their subsidiaries, and thus effectively prevents any banking or underwriting syndicate from making a firm advance commitment for the purchase of such a company's securities, since such a commitment might well disqualify the organization making it from bidding on the securities.

We recognize the merits of the competitive bidding requirement and are aware of the status of Applicant's corporate affiliations, as well as the practical impossibility of its securing firm commitments of full financial authorization at this time, prior to securing our certificate.

The Securities and Exchange Commission has heretofore by two separate actions authorized the issuance and sale of 3,150 shares of common stock of Applicant with a total par value of $315,000. Such authorizations were for the purpose of enabling the formation of Michigan-Wisconsin Pipe Line [fol. 502] Company, and for the prosecution of required applications before regulatory agencies.

In view of these circumstances, it is not necessary that Applicant at this time submit firm proof of its ability to finance the proposed project. This conclusion is reached in recognition of the jurisdiction of the Securities and Exchange Commission in these matters. The certificate issued herein is conditioned upon the securing of the necessary authorizations from the Securities and Exchange Commission, and any action taken by us will be without prejudice to such action which may be taken by that Commission.

Motions—Contentions of Interveners

As indicated previously, prior to the taking of evidence intervener Panhandle filed a motion to dismiss the application of Michigan-Wisconsin.[11] The motion was renewed by oral argument during the course of the hearing. After all evidence had been received, Panhandle on November 19, 1946, filed another formal motion to dismiss on previously stated and additional grounds. Panhandle relies for its several motions upon three main propositions:

(1) That the Commission is without power to deprive Panhandle of its "grandfather" rights by the issuance of a certificate of public convenience and necessity to Applicant;

(2) The Commission cannot lawfully issue a certificate to Applicant since Panhandle is able and willing properly to perform the service proposed;

(3) That Michigan-Wisconsin is not able properly to do the acts and perform the service proposed in its application.

With respect to points one and two, Panhandle contends that it possesses certain proprietary rights and privileges of a complete or partial monopoly of natural gas service in the Detroit and other areas of Michigan. We cannot agree that Panhandle holds any such exclusive rights. We believe that the Natural Gas Act and the legislative history thereon show quite clearly that it would be contrary to public policy [fol. 503] and that this Commission is without authority to grant monopoly certificates, "grandfather" or otherwise, to any natural gas company. It is equally clear that no such company can acquire any monopoly right or privilege by virtue of any certificate issued by this Commission. By reason of the action of the Commission on November 30, 1946, denying Panhandle's motion to dismiss, an extended discussion of such motion is not now necessary. According to such order the Commission held that it has been given statutory authority, pursuant to Section 7(g) of the Act, to grant a certificate of public convenience and necessity, upon a proper showing, for service of an area already being

[11] Motions to dismiss were also filed by Natural Gas Pipeline Company of America and Texoma Natural Gas Company, jointly and Northern Natural Gas Company.

served by another natural gas company under the authority of a previous "grandfather" or "non-grandfather" certificate.

More specifically, the Commission, in said order further found that the fact that Panhandle holds certificates from this Commission authorizing it to transport gas to and sell such gas for resale in the Detroit and Ann Arbor markets, among others, does not of itself preclude the Commission, upon a proper showing, from authorizing another company to so transport and sell natural gas in the same general area. By reason of the findings herein made and the ruling of the Commission by its order of November 30, 1946, we find that the motions to dismiss filed by Natural Gas Pipeline Company of America, Texoma Natural Gas Company, and Northern Natural Gas Company should also be dismissed.

The third point above obviously relates to the merits of Michigan-Wisconsin's application and relates to matters determinative of the question of public convenience and necessity, which matters have received the most earnest and careful consideration of the Commission upon the combined foundation of an exceptionally comprehensive record and a thorough review of pertinent court decisions and previous decisions of this Commission in certificate proceedings. These questions will be dealt with more fully at a later point in this opinion.

On October 11, 1946, the City of Detroit filed a motion for an order requiring the Phillips Petroleum Company to be made a party to this proceeding. In support of such motion it was urged that by reason of the operations to be engaged [fol. 504] in by Phillips in delivering gas to Applicant, Phillips will be engaged in the transportation of natural gas in interstate commerce and the sale of such gas for resale. It is, therefore, urged that this Commission declare Phillips a natural gas company subject to its jurisdiction.

We believe that whether Phillips is or is not a natural gas company cannot properly be determined in this proceeding. If such determination is required it should be made a separate case after a thorough investigation of Phillips' operations and we therefore find that the motion of the City of Detroit should be dismissed.

The intervening coal, railroad, dock and labor interests introduced evidence purporting to show the economic effect

on such interveners of the proposed operations of Applicant's project. Their objections are principally directed to the introduction of natural-gas service into new communities in the State of Wisconsin. These same interests have long been active in opposing the extension of natural-gas service into Wisconsin.

In this proceeding these interveners object, not only to industrial sales, as has frequently been the case in other proceedings, but also to all other classes of natural-gas service. The evidence presented by them as to the economic impact upon their interests if the proposal of Michigan-Wisconsin is effectuated is somewhat speculative and is concerned with broad questions of national policy, including the important problem of conservation and relative advantages and disadvantages of utilization, from the viewpoint of public interest, of the Nation's fuel resources of coal, oil and natural gas.

The coal, railroad, dock and labor interests also urge that there is no expression of desire by the public of Wisconsin for natural gas service. This contention, however, is contradicted by the record. It is true that no public agency of the State of Wisconsin officially espoused the proposal of this Applicant. However, the Chief of the Rate and Research Section of the Public Service Commission of Wisconsin voluntar-y testified as a witness of the Applicant for the purpose of presenting a study prepared by him in [fol. 505] the course of his official duties and entitled "Estimated Market for Natural Gas in Wisconsin." There is nothing in the record to indicate that he so appeared without the sanction of the Wisconsin Commission or that his testimony lacks understanding and authority. This exhibit recites the fact that "Wisconsin is the only state lying in the broad Mississippi River Valley stretching from the Appalachian to the Rocky Mountains which does not have natural gas service."

For a statement as to the position previously taken by the Public Service Commission of Wisconsin with respect to the substitution of natural gas in lieu of manufactured gas as it affects the public interest, we refer to that Commission's opinion of July 17, 1945, In the Matter of Wisconsin Southern Gas Company,[12] where it was said:

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[12] 60 P.U.R. (NS) 284.

"We are satisfied that the introduction of natural gas into the territory served by Wisconsin Southern Gas Company will tend to the economic benefit of all of the portion of the public which resided within that territory. This eventually will redound to the interest not only of the railroads but likewise to the public generally even though it may result in the sale, distribution, or handling of less coal or liquid fuels."

The Wisconsin Commission, in making this declaration, stated that it had given consideration to all of the evidence with respect to the social and economic effects of the proposed substitution upon employment, existing business and industries, railroads and other transportation agencies and facilities.

In view of the above, we are of the opinion that it is not in the public interest to deny the issuance of a certificate of public convenience and necessity by reason of the failure of Applicant to meet certain statutory requirements of the State of Wisconsin in the matter of local consents. Such consents must, of course, be secured. Our certificate, therefore, is conditioned upon the obtaining of such consents from the communities in Wisconsin proposed to be served as well as from the Public Service Commission of Wisconsin.

[fol. 506] The economic impact upon the coal industry, the railroads, and those employed in these industries, constitutes only one of the factors to be taken into account in the Commission's determination upon this certificate application. A more comprehensive review than is possible in this case of the entire natural gas industry and related matters is required, we think, before the Commission can reach a conclusion on the basic issues raised by these interveners. In this proceeding under the provisions of the Natural Gas Act, the Commission is charged with the obligation to issue a certificate when found to be required by the public convenience and necessity, and we have made such finding on the basis of the facts of record.[13]

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[13] To same effect see: Natural Gas Pipeline Company of America, et al., Docket Nos. G-651; G-664, Opinion No. 123; Mississippi River Fuel Corporation, Docket No. G-713, Opinion No. 141.

Public Convenience and Necessity.

In discussing the question of public convenience and necessity it is necessary to view the question of public interest not only in its limited but also in its broader aspects. The economic effect of the proposed project upon the present and potential gas consuming public in the area affected must also be considered in making this determination.

There can be no question but that there is an unprecedented demand for natural gas service by the consuming public throughout all those sections of the country where natural gas is available for distribution.

Further, it cannot be questioned that this tremendous increase in demand necessitates the construction of substantial pipeline capacity to transport natural gas from areas of large gas reserves in the West and Southwest to the populous consuming areas.[14] The need for additional pipeline capacity appears to be particularly acute in the [fol. 507] Midwest and eastern Appalachian areas.

The granting of this certificate, it is argued, will result in wasteful duplication of facilities. Upon analysis, it is found that there is no substance in that argument. If additional gas service is to be furnished to meet the demands, large additional investment and construction is necessary. Whether the most satisfactory and most economical long range service can be given by existing pipelines or whether a new certificate should be granted to a new company cannot be determined by an a priori argument. Such circumstances, among others, as underground storage possibilities, character of market, sales policies of distributing companies, must influence cost of service to the ultimate consumer.

During the war period, due to extreme shortages of natural gas which threatened war production and essential civilian uses, this Commission authorized the construction by many companies of substantial additions to the capacity of

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[14] The records of the Commission show that between July 1, 1945, and September 30, 1946, it issued 90 certificates of public convenience and necessity for the construction and operation of natural gas pipeline facilities intended to add at least 1,106,000,000 cubic feet of natural gas daily to the aggregate supply of several score of communities in many parts of the country (FPC Release No. 3169, dated December 16, 1946).

their pipelines in order to meet the then existing demands. One of the principal companies concerned in obtaining needed additional capacity on its system during that period was Panhandle. Additional capacity was provided for Panhandle and others principally to meet the ever-increasing demands of war industries. At that time the companies and this Commission were concerned with the problem of whether or not there would be sufficient peacetime demands for such additional natural gas. It was reasonable to suppose that the solution of this question depended upon the manner in which the conversion from war production to peacetime production was effected. At the termination of the war it became apparent that instead of having idle capacity in their pipeline systems, natural gas companies found themselves in an extremely critical situation due to the unexpectedly large demands made upon them for additional gas on the part of both industry and the general public.

It is generally known in the industry, and has become an accepted fact, that the natural gas companies serving the Midwestern and Eastern markets are now and will for some time to come be unable to meet the firm demands placed upon them because of the shortage of steel pipe. It is also well [fol. 508] known that it has been necessary for a number of State commissions to permit distributing companies to refuse service to additional househeating and industrial customers in order to protect the available gas supply. The result of this unfortunate situation will be that for an indefinite period a large sector of the country will not be able to have its demands for adequate and satisfactory natural gas service satisfied. This is a matter of deep concern not only to this Commission but also to the natural gas companies. In this connection it may be pointed out that this Commission has not denied any of the applications filed by Panhandle for increased capacity in an endeavor to solve its problem of meeting present firm gas demands, aside from interruptible and direct industrial sales.

Due to the serious curtailments effect on the Panhandle system and by reason of the increased demands made upon it, this Commission has held conferences and hearings with Panhandle, its customers, and interested State commissions in the hope that a method could be devised whereby essential domestic, commercial, and industrial demands would be

taken care of. All parties to such proceedings, including Panhandle, readily acknowledged the fact that the demands on the latter's system greatly exceed the sales capacity of existing facilities.

These conferences and hearings have resulted in the adoption of an order by this Commission of which we take notice (Docket Nos. G-200, 207) permitting emergency service rules and regulations to govern deliveries of gas by Panhandle when curtailment of gas deliveries is necessary during this present winter period. These rules were the culmination of a voluntary agreement entered into between Panhandle and its customers so that an equitable distribution of the insufficient gas supply might be made and curtailments put into effect on a basis equitable to all concerned.

In order to supplement further the gas supply principally in the Appalachian area, this Commission has recently authorized the Tennessee Gas and Transmission Company (Docket No. G-824) to operate the Big Inch and Little Big Inch gas lines for the purpose of *supply* up to 150 million [fol. 509] cubic feet of gas per day until April 30, 1947. Panhandle receives a share of this additional and temporary supply.

We point to the above facts as a clear indication of the great public need for gas in the area proposed to be served by Applicant. Naturally, it is not possible to predict accurately what the future supply and demand situation will be, but the conclusion is inescapable that if restrictions were removed from local distributing companies and the many thousands of actual and potential house-heating and firm industrial customers were permitted to receive the quantities of gas they desire, Panhandle or any other company that might be similarly situated may find it difficult to render adequate service to such customers at least within the reasonably foreseeable future.

Thus it appears to us that for the present and for some considerable period in the future the gas utilities will face the continuing problem whether they will be in a position to render full and adequate service to firm domestic and commercial consumers and reasonably satisfactory gas service the industrial customers whose operations require the use of natural gas.

With respect to the Detroit and Ann Arbor markets in Michigan, the record shows that natural gas was first intro-

duced into such markets in 1936 and that Panhandle has been the principal source of supply to the distributing company, Michigan Consolidated, for these markets. It is contended that the volumes of gas which Michigan Consolidated may purchase under its contract with Panhandle is not now and has not been for some time sufficient to meet the increasing demands of its consumers, especially in the Detroit area. Further, the record shows that the deficiency is becoming constantly greater.

Due to such increased demands State regulatory commissions have taken formal action in order to restrict and discourage the public from using gas for space-heating purposes. The consuming public in Detroit and elsewhere has, therefore, been unable to receive natural gas in sufficient volume to meet its needs and desires by reason of the inability of distributing companies to obtain adequate quantities of such gas.

[fol. 510] The evidence indicates a history of fruitless negotiations for many years between representatives of Michigan Consolidated and Panhandle looking toward a satisfactory agreement between the parties covering the sale of increased deliveries of gas to Michigan Consolidated. These conferences have not been successful as the parties have not been able to agree on the terms and conditions of a new contract. Apparently one of the difficulties in reaching an understanding has been the aim of Panhandle to have guaranteed to it by contract an express right to make direct industrial and unregulated sales in the Detroit district. It is not for us here to decide these controversies but rather to ascertain the best solution to the problem involved as the public interest requires.

Although the City of Detroit, through its Corporation Counsel, has objected to the granting of the application of Michigan-Wisconsin and thus apparently is opposed to providing, in this manner, an additional gas supply to Detroit and the surrounding cities and towns,[15] the Michigan Public Service Commission, which has an obligation imposed upon it to regulate matters of this kind on a state-wide basis, has

[15] Including such communities as Dearborn, Ecorse, Hamtramck, Highland Park, Lincoln Park, River Rouge and Wyandotte, all of which are in the "Detroit District" of Michigan Consolidated.

forcefully urged this Commission to act favorably upon the instant application. The record, however, also indicates that the representatives of the City of Detroit not only conceded the need for substantial additional quantities of gas for their city, but urged that this Commission take definitive action in order to assure an adequate supply of gas for the people of Detroit.

In presenting the position of the State commission, the Assistant Attorney General of the State of Michigan stated unequivocally that the instructions he received from that Commission were that it recommends the granting of the certificate in this proceeding, that Michigan is in need of natural gas and that it is necessary therefore for the state to receive the proposed service:

In order to meet increasing winter demands Michigan Con- [fol. 511] solidated has from time to time augmented its facilities for manufacturing gas. With the recently installed liquid petroleum gas plant, Michigan Consolidated now has capacity to deliver 72,000 Mcf. of manufactured gas per day. Thus with the 125,000 Mcf. available from Panhandle, Michigan Consolidated will be able to met its anticipated maximum demand of 197,000 Mcf. during this present winter period.

During the hearing, Panhandle offered to make available to Michigan Consolidated an additional 2,500 Mcf. per day of the 10,000 Mcf. of increased system capacity resulting from the construction of the "Group A" facilities previously authorized. Panhandle also stated it would agree to deliver to Michigan Consolidated an additional 25,000 Mcf. per day when its "Group B" facilities are constructed, providing a new contract is entered into "for a reasonable term of years on a reasonable basis of delivery." According to the testimony of representatives of Michigan Consolidated such volumes of gas do not make adequate provision for satisfactory service especially in future years.

Public convenience and necessity comprehends a question of the public interest. Or stated another way: Is the proposal conducive to the public welfare? Is it reasonably required to promote the accommodation of the Public? In the matter before us, it certainly cannot be denied that the continuance of natural-gas service in the Western Michigan markets of Michigan Consolidated after the depletion of present sources of supply is conducive to the public welfare

and will promote the accommodation and convenience of the public. Nor can it be denied that the enhancement of present deliveries in the Detroit and Ann Arbor districts will serve public convenience and necessity.

As we have previously stated, Michigan-Wisconsin proposes to serve certain communities in the States of Wisconsin, Iowa, and Missouri, as well as the so-called Western Districts of Michigan Consolidated Gas Company, in addition to the Detroit and Ann Arbor markets. Accordingly, with the affirmative action taken upon the application of Michigan-Wisconsin, a combined population of more than 1,388,000 people will for the first time secure the benefits to be derived from the introduction of natural gas service in [fol. 512] the communities in Wisconsin, Iowa and Missouri.

Section 7(c) of the Act provides for the issuance of a certificate if it is found that certain statutory prerequisites are met, among which is the finding that the proposed construction, operation, etc., "is or will be required by the present or future public convenience and necessity." And, as previously noted, Section 7(g) empowers the Commission "to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company."

The phrase "public convenience and necessity" has a meaning different from that which a summation of the literal definitions of the several words would connote. This is well stated in the opinion of the court in the case of Wabash, Chester & Western Railway Company v. Commerce Commission, 309 Ill. 412, 141 N. E. 212, 1924A P. U. R. 548, 553, 554, where it was said:

"When the statute requires a certificate of public convenience and necessity as a prerequisite to the construction of extension of any public utility, the word 'necessity' is not used in its lexicographical sense of 'indispensably requisite.' If it were, no certificate of public convenience and necessity could ever be granted. The first telephone was not a public necessity under such a definition, nor was the first electric light. Even the construction of a waterworks system in a village is seldom necessary though highly desirable. However, any improvement which is highly important to the public convenience and desirable for the public welfare may be regarded as necessary. If it is of sufficient importance

to warrant the expense of making it, it is a public necessity."[16]

[fol. 513] Panhandle opposes the granting of this application and in particular the rendition of natural gas service by the Applicant to Michigan Consolidated. Panhandle takes the position that the granting of a certificate will result in confiscation of its property without due process of law and further that any service rendered by Applicant will be in violation of certain claimed rights and privileges conferred upon Panhandle by either its "grandfather" certificate or "non-grandfather" certificates.

We fail to find anything in the evidence showing that an effort was made to sustain such position, which, as has been held earlier in this opinion, is wholly without merit.

Panhandle's "grandfather" certificate, even when given a most liberal interpretation, cannot be construed as extending its authorization beyond substantial parity with the operations, service, transportation and sale actually performed on February 7, 1942.

The granting of a certificate to Michigan-Wisconsin will result, when Applicant's facilities are completed and in operation, in regulated and competitive gas service in the Michigan territory now served by Panhandle. The term regulated competition as here used does not mean ruinous, unlimited or unnecessary competition. The term means competitive service required to meet public convenience and necessity and to serve the public interest. We are of the opinion that the large existing and rapidly expanding gas markets afford ample opportunity to Panhandle, not only to maintain its present favorable financial and operating position, but also as providing opportunity for growth in the areas now served by it and for expansion. There

[16] To the same effect: David Abbott v. P.U.C., 48 R.I. 196, 136AT 490. 1927C P.U.R. 436, 438, 439; Canton-West Liverpool Coach Co. v. P.U.C. of Ohio, 123 Ohio State 127, 174 N.E. 244, 1931C P.U.C. 196, 197, 198; C., R.I. & P. Ry. Co. v. State, 126 Okla. 48, 258 Pac., 874, 1928A P.U.R. 255, 261; Yazoo & Mississippi Valley R.R. Co. v. La. P.S.C. 170 La. 441, 128 So. 39, 1930D P.U.R. 312, 314; San Diego & Coronado Ferry Co. v. Railroad Commission of Cal., 210 Cal. 504, 292 Pac. 640, 1930E P.U.R. 464, 469.

is also now available an assured and growing market for the new service proposed to be rendered by Applicant. Although there may be instances where the entry of a competitive service, regulated or unregulated, might prove to be ruinous to the company, presently serving the area, and inimical to the public interest, however, this possibility is not even remotely present in this case.

With Michigan-Wisconsin's proposed service there will become available to the Michigan market an alternative service and supply of natural gas from the area of the [fol. 514] largest gas reserves in the United States. That such an independent additional and reliable source of supply will be of great value to the area to be served and benefit public convenience and necessity admits of no doubt.

The Michigan community will not be the only large area in the country that enjoys the advantage of alternative services and sources of natural gas made available by certificates granted by this Commission. The Pittsburgh area and southern California are cases in point.[17]

Therefore, to the extent of any rights, duties and obligations of Panhandle with respect to the Detroit and Ann Arbor markets, the action taken by us in this proceeding should not be construed as in any manner affecting such rights, duties and obligations during the term of the existing contract with Michigan Consolidated.

In the instant case there is no issue before us relating to an intention on the part of either Panhandle or Michigan Consolidated to refuse to continue those operations which are necessary in order to render gas service to the consuming public in Detroit and Ann Arbor. We do not believe that a "grandfather" certificate means that whenever a contract expires between two companies the local dis-

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[17] The Pittsburgh region is served from extensive areas in Pennsylvania, West Virginia and Texas sources by The Manufacturers Light & Heat Company, The Peoples Natural Gas Company, Equitable Gas Company (Pennsylvania, West Virginia and Kentucky). The Southern California area is served from large reserves in Southern and Central California and will be served with an additional supply from Texas and New Mexico by Southern California Gas Company and Southern Counties Gas Company.

tributing company is forbidden from augmenting its gas supply from another source. It is not bound, nor can it be compelled, to execute a renewal of its contract with the present supplier regardless of any other considerations.

As an example of the freedom which is accorded to natural gas companies to contract freely, the case of The East Ohio Gas Company may be cited. That company at one time received its entire interstate gas supply from the Hope Natural Gas Company. When it became evident that the Hope Company could not supply sufficient quantities of gas to [fol. 515] satisfy the requirements of East Ohio, that company sought and obtained by contract an additional source of gas supply from Panhandle. Assuming that at the expiration of its present contract with Panhandle, East Ohio determined that it could receive sufficient quantities of gas from the Hope Natural Gas Company or any other natural-gas company, it would be free to contract as it saw fit, provided, of course, adequate service would be rendered and that there was no abandonment of service or facilities involved inconsistent with the public interest.

The distribution company, Michigan Consolidated, furnishing gas to the ultimate consumers is part of the public whose convenience and necessity we have to consider in making a decision on this application. Although Michigan Consolidated desires, in a way, to serve its own private interest, as distinguished from the interest of its customers, it is a fact that such public-consumer interest is directly affected by the conduct of Michigan Consolidated's business. This is true both as to rates and service. Distinguishing between Michigan Consolidated's own interest and the ultimate consumer's interest, there is nothing unusual or objectionable in the distributing company's effort to assure itself, in the best manner possible of a long-term natural gas supply at a low cost and under favorable conditions. It is also understandable that this large distribution company should desire to control, if not directly own and operate a long-distance transmission line from the source of supply in the Hugoton Field to the point of distribution in Michigan.

In this respect there is a close analogy between the supply arrangements proposed between Michigan Consolidated and Michigan-Wisconsin, and the arrangements existing with re-

spect to the supply of gas to many other important sections of the country.[18]

[fol. 516] Panhandle's present markets is constantly growing and the volume of sales has increased tremendously

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[18] For example the Peoples Gas Light & Coke Company which serves Chicago, Illinois, and controls Chicago District Pipeline Company, its immediate supplier, and has a substantial interest in Natural Gas Pipeline Company of America and Texoma Natural Gas Company. United Gas Corporation controls United Gas Pipe Line Company and Union Producing Company, the latter supplying in part the requirements of United Gas Pipe Line Company which company in turn supplies gas to United Gas Corporation. Lone Star Gas Company which furnishes natural gas to many communities in Texas and Oklahoma and operates its own extensive transmission system receives a large portion of its gas supply from Lone Star Producing Company. Cities Service Gas Company, which operates an extensive pipeline network, is the source of supply to its affiliated distribution companies, Kansas City Gas Company, Wyandotte County Gas Company and Gas Service Company. Southern California Gas Company and Southern Counties Gas Company which distribute gas in a large area of Southern California, operate numerous pipelines extending to producing fields and also purchase a considerable portion of their gas supply in their distribution territory from their parent company, Pacific Lighting Corporation, which transports such gas from the gas producing fields of California. Southern Natural Gas Company which operates an extensive transmission system is the sole source of gas supply to a number of affiliated distributing companies in Mississippi and Alabama. In the Appalachian area the common practice is to have production, transmission and distribution operations integrated through common financial control as in the case of Columbia Gas & Electric System, Consolidated Natural Gas Company system, Standard Gas & Electric Company system and National Fuel Gas Company system.

since 1935. This growth is shown by the following five years' comparison:

Year	Annual Gas Sales, Millions of Cubic Feet	Per Cent Increase Over 1935
1935	15,979	
1938	41,186	158
1941	63,438	297
1943	87,559	448
1945	120,158	652

Panhandle, it is evident, has enjoyed a rapid and highly successful development and expansion. The record in this proceeding shows that since the beginning of its operations in 1932, Panhandle's volume of gas sales have increased each year and the company has, with some regularity, added facilities to increase the delivery capacity of its system. The rate of increase in both volume of gas sales and delivery capacity has been particularly rapid beginning with 1942. Since 1942, the designed daily sales capacity of Panhandle's pipeline has been increased from 250,000 Mcf. to 393,000 Mcf. per day, and a certificate authorizing the installation of additional facilities to bring the sales capacity up to 473,000 Mcf. per day was issued on November 30, 1946. In 1942, Panhandle's annual sales were 70,000,000 Mcf. and by 1945 were 120,000,000 Mcf. The record indicates that this [fol. 517] large rate of growth is far from being at an end. Panhandle has submitted estimates of annual sales through 1948. It estimates that its sales in that year will be 165,000,000 Mcf. of which 43,000,000 Mcf. would be sold to Michigan Consolidated, or a total of 122,000,000 Mcf. excluding that company. Furthermore, the record indicates that such estimates are conservative, because the estimates of the managing officers of utilities purchasing gas from Panhandle, and who admittedly are in a better position to determine their actual needs for gas, are almost invariably higher than the estimates of Panhandle. The estimates of the distributing utilities were characterized on the witness stand by Panhandle's Vice President Morton as being influenced by "an optimism which probably expresses the hope for the future that he will have plenty of gas from the pipeline company."

Panhandle's estimates of annual sales for 1947 and 1948 include 9,000,000 Mcf. or 25,000 Mcf. per day for the Ohio Fuel Gas Company. Panhandle's contract with Ohio Fuel provides for the delivery of 25,000 Mcf. per day for a period of 20 years and for the delivery of a second 25,000 Mcf. per day for a period not in excess of five years, subject to cancellation under certain conditions prior to that period. Panhandle's estimates assume cancellation of the agreement for the sale of the second 25,000 Mcf. per day in 1947, although the record in this proceeding shows that the President of Ohio Fuel testified before the Commission in Docket No. G-620 that Ohio Fuel would be very glad to contract for the full 50,000 Mcf. per day on the long-term contract, "but we did not find a very willing seller in this particular case." The record here also shows that this executive testified in Docket No. G-620 that Ohio Fuel could purchase such volumes as it has capacity to transmit through its system and deliver to consumers in Ohio without extensive rebuilding up to 80,000 Mcf. per day (equivalent to 29,000,000 Mcf. per year on 100 per cent load factor), if the gas were available from Panhandle. Thus Panhandle's estimate of sales to Ohio Fuel in 1948 are at least 9,000,000 Mcf. and possibly as much [fol. 518] as 20,000,000 Mcf. lower than that customer is willing to buy in that year.

Panhandle estimates that its sales to The East Ohio Gas Company in 1948 are 18,000,000 Mcf. or 50,000 Mcf. per day. East Ohio contracted in 1943 with Panhandle for the purchase of 50,000 Mcf. per day on a firm basis, and up to 50,000 Mcf. per day additional, if available, on an interruptible basis. East Ohio has never received more than about 50,000 Mcf. per day from Panhandle, and therefore presents a potential market for the sale by Panhandle in 1948, of 18,000,000 Mcf. more than included in the latter's estimate of sales in that year.

Again, Consumers Power Company estimates that its sales to consumers would be 28,000,000 Mcf. in 1948 if it had a dependable supply of gas sufficient to warrant the promotion of gas sales, compared with the 22,000,000 Mcf. which it estimates it will be able to sell in 1948 with the volume of gas available to it from its rapidly declining fields in Michigan and from Panhandle.

In 1945, Panhandle sold somewhat over 4,000,000 Mcf. to a group of small utilities in Indiana, Ohio and Michigan and

it estimates that these sales will increase to 5,300,000 Mcf. in 1948. One of these companies, Battle Creek Gas Company, which purchased about 600,000 Mcf. from Panhandle in 1945, or about 15 per cent of the total for the group, testified that its estimated sales in 1948, if the gas were available to it, would be 5,800,000 Mcf. or more than Panhandle estimated it would sell in that year to the entire group.

It is quite evident from these few examples that Panhandle's future market for natural gas will be considerably greater than its recent estimates.

Conclusion

By reason of the foregoing circumstances and upon consideration of the entire record, we find that public convenience and necessity require the construction and operation of the proposed facilities of Applicant to the extent indi- [fol. 519] cated in this opinion and our order of November 30, 1946, issuing a certificate of public convenience and necessity.

Nelson Lee Smith, Chairman; Richard Sachse, Commissioner; Harrington Wimberly, Commissioner.

Dated at Washington, D. C. this 17th day of January, 1947.

Leon M. Fuquay, Secretary.

Date of Issuance: February 7, 1947.

DRAPER, Commissioner, dissenting:

While subscribing in the main to the views presented by Commissioner Olds in his dissent, I must respectfully call attention to certain additional considerations which prevent my agreeing with the majority in this case. The facts have been stated sufficiently in detail and I shall endeavor not to be repetitious.

It is my firm conviction that where the situation is as it is in the present proceeding, in the absence of a clear showing by a prospective competitor (the applicant, Michigan-Wisconsin Pipe Line Company) that it is in a position to render more adequate and satisfactory service than that being rendered by the existing supplier of the area involved, at just and reasonable rates, then the application must be

denied inasmuch as the public interest would in no way be benefited by authorization of a second pipe line, either by better service or by lower rates.

The service rendered by Panhandle Eastern Pipe Line Company, now and for many years in the Detroit and Ann Arbor area either directly or by wholly owned affiliate, is pursuant to authority granted it by direction of Congress by reason of the fact that it was bona fide engaged in the transportation and sale of natural gas subject to the jurisdiction of this Commission on the effective date of the amendatory Act within the area which Michigan-Wisconsin Pipe Line Company now seeks to invade. The Commission, furthermore, has authorized additions to the original grant upon proper showing of necessity.

The majority made a finding in part as follows (also quoted by Commissioner Olds):

[fol. 520] "Panhandle Eastern Pipe Line Company has reasonably met its contractual obligations to supply natural gas to Michigan Consolidated Gas Company for resale within its Ann Arbor and Detroit, Michigan, distribution areas and has expressed a willingness to meet the enlarged requirements of said local markets. It is therefore entitled to reasonable protection in the service of these markets and to an opportunity to participate in their growth."

The record clearly supports such a finding and I heartily concur therein. But the majority does not arrive at the consequences which such a finding, in my opinion, demands. The "reasonable protection" to which Panhandle is admitted to be entitled is denied and a new company is permitted to come in without proving its right to do so.

When application for a certificate to enter an occupied field is made, the existing utility (here a natural gas company) should be viewed as of the day the application is filed and if it is not doing its full duty to the public as a utility, the applicant should be allowed to enter, providing always that the utility desiring to enter establishes the fact that it is in a position to render more adequate and satisfactory service than that rendered by the existing utility at just and reasonable rates. Of the application of this proviso to the instant case I shall speak in a moment.

As Commissioner Olds points out, existing facilities which are doing their duty should be treated with fairness and liberality and their territory (service area) reserved to them,

thus encouraging continued investments and improvements with the assurance that the capital invested will be secure. Only by the encouragement of such continued investment is the public interest kept paramount.

Nowhere has it been shown that Panhandle has failed in its duty and obligation to the general public or that it does not intend to meet such duty and obligation in a satisfactory manner in the future as rapidly as economic conditions permit, as evidenced by the plans which it has submitted to the Commission for future expansion of its facilities.

On the contrary, the evidence shows that during the period 1937 to 1945 inclusive, there was available to Michigan Con- [fol. 521] solidated under its contract with Panhandle a total of more than 363 billion cubic feet of natural gas, of which Michigan Consolidated has taken 217 billion cubic feet, or only 59%. Notwithstanding this showing that the present facilities serving Detroit and Ann Arbor markets were only partially utilized, we are asked for authorization to construct and operate additional facilities to serve a purpose for which facilities are already available but not being used by the very interests (Michigan Consolidated) which claim to require an additional supply of gas.

That competition in the public utility field invariably leads to duplication of properties with resultant economic loss and to divided service with its attendant evils is, to me, an inescapable conclusion. Consideration must be given to the fact that a public utility is in its very nature a monopoly subject to proper regulation by public authority. The result of such regulation through the years has been to render the evils of monopoly practically non-existent.

But in my opinion the fact that Panhandle is serving and, for all that appears, will continue to serve the area involved satisfactorily is not the controlling consideration in this case. If the showing in this record was that Panhandle had not met its present obligations and had not expressed a willingness to meet the additional requirements of its markets in the future, Michigan-Wisconsin Pipe Line Company, I believe, should still not be granted a certificate of public convenience and necessity to construct and operate the facilities covered by its application because, in my opinion, the statutory findings required by Section 7(e) of the Natural Gas Act cannot be made or supported on the present record before us.

Said Section 7(e) says that a certificate shall be issued: "* * * if it is found that the applicant *is able* and willing

properly to do the acts and to perform the service proposed • • • and *that the proposed service,* sale, construction • • • *is or will be required* by the present or future public convenience and necessity; *otherwise such application shall be denied.*" (Emphasis supplied.)

I cannot find proof of either present or future ability on the part of the applicant herein:

[fol. 522] (1) to assure the availability of adequate supplies of natural gas firmly committed to the exclusive use of the applicant;

(2) to assure the availability of adequate financial resources with which to construct the project;

(3) to command the markets in the State of Wisconsin which it alleges to be part of the necessity for its new lines. Since to me these elements are essential to the making of the findings required by Section 7(e) above quoted, their absence dictates that the application shall be denied.

Counsel for the National Coal Association, the United Mine Workers and the Railroad Unions very aptly stated during the hearing, as reported at page 17,051 of the Record in this proceeding:

"• • • you may condition a certificate to effect the use of a facility for which the certificate is issued, and you must do so within certain reasonable limitations, but you cannot under the guise of a condition avoid the necessity of having presented, before a certificate is offered, the statutory requirements which go to establish public convenience and necessity and ability and willingness to serve."

I find no justification in the Act for the granting of a certificate conditioned upon a future meeting of requirements which have become established by unquestioned precedent as part of the criteria of the ability to do acts and perform service contemplated by certificates of public convenience and necessity. The majority seems to me to be exceeding the bounds of the permissive language quoted from the Natural Gas Act when it attempts to confer upon Michigan-Wisconsin Pipe Line Company the privileges and rights of a certificate and, yet allows a deferment of the meeting of the

requirements therefor. Such action I cannot persuade myself to be within our power under the statute.

Claude L. Draper, Commissioner.

February 3, 1947.
Date of Issuance: February 7, 1947.

[fol. 523] Olds, Commissioner, dissenting:

I cannot agree with the majority decision authorizing Michigan-Wisconsin Pipe Line Company to supply gas to certain markets now served by Panhandle Eastern Pipe Line Company. I am convinced that good service in the public interest requires assurance to an existing supplier that, so long as it is able and willing to provide adequate service at reasonable rates, its markets shall not be turned over, in whole or in part, to another. I think that is good utility law and administration because it produces sound results, i. e., places the maximum undivided responsibility on the established company.

Furthermore, I think that was the intention of Congress, when it amended Section 7 of the Natural Gas Act, providing, among other things for the automatic granting of so-called "grandfather" certificates to existing companies for their operations as of February 7, 1942. I am sure it wanted to protect such companies in their markets so long as they lived up to their obligations. And I feel certain that Congress could hardly have expected that this assurance would be so soon impaired in the case of a company doing a reasonably satisfactory job.

In the instant case the record contains no substantial showing of failure or unwillingness on the part of Panhandle Eastern to carry this responsibility. Therefore, on the record, Panhandle Eastern is entitled to supply gas to the Michigan Corsolidated Gas Company's Detroit and Ann Arbor markets to the extent requiring the full use of the capacity of facilities for which this Commission has issued certificates, and, in addition, to the first opportunity to supply the expanding needs of these markets.

The majority, in its order of November 30, 1946, gave lip service to this principle. It found (finding (3)), that: "Intervenor, Panhandle Eastern Pipe Line Company, has reasonably met its contractual obligations to supply natural

gas to Michigan Consolidated Gas Company for resale within its Ann Arbor and Detroit, Michigan, distribution areas and has expressed a willingness to meet the enlarged [fol. 524] requirements of said local markets. It is therefore entitled to reasonable protection in the service of these markets and to an opportunity to participate in their growth. * * *"

But, in the balance of finding (3), the majority then resorted to an obviously strained argument to justify granting Michigan-Wisconsin authority to invade this Panhandle Eastern market on the ground that the latter company "has not applied for sufficient facilities nor demonstrated its ability to serve adequately the needs of these markets." Such argument overlooks the fact that Panhandle Eastern, on the basis of additional facilities recently authorized by the Commission, has offered Michigan Consolidated 27½ million additional cubic feet of gas per day, an increase of about 20 per cent in its present obligation to deliver, which has not yet been accepted; and the further fact that, in line with the Commission's request of December, 1945, Panhandle Eastern has advised the Commission of expansion plans for its so-called "Group C" and "Group D" facilities, which will increase its total delivery capacity from the presently authorized 473 million cubic feet to approximately 725 million cubic feet per day.

The majority, in its reflection on the adequacy of Panhandle Eastern's service to these markets, has also chosen to ignore the influences, growing out of the war and reconversion periods, which have created serious problems for practically every major gas pipe line system responsible for delivery of gas from the Southwest to the Great Lakes-Appalachian region. From February, 1942, until the end of war controls, these companies were subject to War Production Board control both as to expansion of capacity and allotment of deliveries. Since controls were removed there has been a critical shortage of steel for the pipe line expansion required to meet the sudden upsurge in residential and other space heating load.

The majority, in its order of December 30, 1946, referred to the Commission's previous order of December 12, 1946, accepting temporary amendment of Panhandle Eastern's rate schedules to cover emergency curtailment regulations for the present winter season. They apparently consider

[fol. 525] the necessity for such curtailment as having some bearing on the company's rights under its certificates. But they fail to relate this necessity to a region-wide shortage requiring serious curtailments by Northern Gas Natural Gas Company, the Columbia System, Equitable Gas Company, the Consolidated Gas System and the National Fuel System, as well as Panhandle Eastern.

This situation made it necessary for the Commission to authorize emergency operation of the Big and Little Big Inch lines for delivery of gas to all of these companies except Northern Natufal in accordance with Commission approved allocations. It also necessitated the filing by Northern Natural of emergency curtailment regulations which the Commission allowed to become immediately effective by order of January 24, 1947. Even a superficial examination of the causes of this condition would disclose that it does not reflect such failures on the part of all these companies to live up to their obligations as to warrant impairing their rights to the markets they are now serving under Commission certificates.

Panhandle Eastern faced a further handicap in its planning to meet future requirements of the Detroit market. For, from 1944 on, it could never make commitments for service of the growing requirements of this market with any assurance that it might not be deprived of the market by the scheme of a holding company to link its gas distribution subsidiaries through the proposed Michigan-Wisconsin pipe line. And it may be noted in passing that Michigan Consolidated never began asking for more gas until after the War Production Board had taken control out of Panhandle Eastern's hands, that it never indicated unequivocally its readiness to contract for more gas, and that it has never to date purchased from the Panhandle Eastern all the gas it was entitled to on an annual basis under the existing contract. In fact prior to 1945, with the single exception of 1941, Michigan Consolidated failed to take even the maximum daily contract volumes.

For the Commission to take advantage of this war and post-war situation, which has found many companies unable [fol. 526] to meet all demands, to authorize a new company which has met none of these problems to enter the markets built up by an established company, on the finding that the latter is unable or unwilling to provide adequate service,

appears to me grossly unfair and not calculated to promote responsible operation of this great industry in the public interest.

If there is any question in the minds of the majority as to the ability or willingness of Panhandle Eastern to provide adequately for these markets, it would seem the part of wisdom, as well as sound regulatory procedure, not to be pushed into a hasty conclusion, which prematurely convicts Panhandle Eastern of failing to do its duty, but to postpone action until reconversion problems are over. Meanwhile, it would be possible to observe carefully whether Panhandle Eastern proceeds in accordance with its responsibility as a public utility, whether Michigan Consolidated seeks in a responsible way to obtain additional supplies of gas on reasonable terms, and whether Panhandle shows a readiness to cooperate in meeting reasonable requests. The majority's finding and order, construed as an expression of policy, would seem to introduce a new financial risk, which might necessitate the raising of the rate of return the Commission has hitherto found fair for an industry expanding to meet the requirements of assured markets.

This is important because the Commission, in numerous rate cases, has established 6½ percent, and subsequently 6 percent as a fair rate of return on the basis of the finding that the companies in question are "in a strong position to attract capital upon favorable terms."[1] It has quite regularly attributed this strong position, among other things, to the fact that these pipe line companies have "established markets with great potential growth."[2] The courts, in upholding the decisions of the Commission, have referred to [fol. 527] "protected established markets"[3] or "stable markets"[4] as among the factors minimizing risks or materially reducing "basic business risks that might be present under other circumstances."[4]

Now it is true that in most instances the Commission and the courts have related the fact of "established mar-

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[1] See: Cleveland v. Hope Natural Gas Company, 3 FPC 150, 186.

[2] Mississippi River Fuel Corporation, FPC Opinion No. 126, November 9, 1945.

[3] Hope Natural Gas Company v. FPC 320 U.S. 591.

[4] Colorado Interstate Gas Co. v. FPC, 142 F(2d) 943, 961.

kets" to a set-up in which the pipe line company sold its gas through affiliated distribution companies. But I cannot believe that the majority mean that a pipe line company's market shall be less secure when dependent upon a certificate from this Commission than when dependent upon contracts with affiliated distribution outlets. Nor do I believe that the majority would approve a higher rate of return to compensate for the greater risk of a company depending only on a certificate. In fact, the Commission, in its decision in Panhandle Eastern Pipe Line Company rate case, in which it fixed 6½ percent as a fair rate of return, said:

"The evidence discloses that the respondent's business is exceptionally free from serious business hazards. The gas supply is assured for at least 30 to 35 more years. • • • The respondent's markets are rapidly expanding and embrace the large metropolitan area of Detroit, which alone takes 40 percent of the entire output under a long-term contract."[5]

The United States Supreme Court, in upholding the Commission's rate of return in this case, quoted this statement.[6]

The order of November 30, 1946, it seems to me, is fundamentally defective to the extent that it fails to make a definitive finding as to Panhandle Eastern's rights in the markets served by Michigan Consolidated. Such a finding would appear a prerequisite to the granting of a certificate to Michigan-Wisconsin because without it there could be no [fol. 528] determination as to the sufficiency of the market to enable the applicant to operate on an economically sound basis. The record contains testimony by applicant's witnesses to the effect that, without the Michigan Consolidated's Detroit market, their project could not be supported.

The serious difficulty in the position of the majority is clearly revealed in its supplementary order of December 30, 1946, and the ensuing hearing of January 15-17, 1947. The order showed the majority attempting to obtain more evidence on which to make the finding which was necessary

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[5] Detroit v. Panhandle Eastern Pipe Line Co. 3 FPC 273, 286.

[6] 324 U. S. 635, 650.

to support its order of November 30, 1946. The hearing brought out no more substantial evidence than a copy of a proposed contract which Michigan Consolidated had offered Panhandle Eastern for limited supplies of gas after the expiration of the present contract in 1951 and an attempt to bring pressure on the latter company to accept this contract as a measure of its rights.[7]

The majority would seem to have left the Commission open to the allegation that the determination of the rights, attaching to a series of certificates which it has issued, can be based on past deliveries under an old contract, coupled with what a party interested in promoting a competing pipe line is ready to contract to purchase at the expiration of that contract, rather than on the actual grant of certificates and the company's obligations thereunder. The attorney for the Kansas Corporation Commission pointed out that this was tantamount to abdication of the Commission's duty under the Act, a delegation to the parties themselves of the duty of determining the ultimate issue before the Commission as to the rights and duties of Panhandle Eastern.

There should be no confusion between the rights and obligations established by a private contract and those deriving from a government-issued certificate of public convenience and necessity. Certainly those deriving from government cannot be made subordinate. An agency exercising the authority of the government cannot turn over its responsibility for such basic policy matters to deter-[fol. 529] mination through contracts between private parties, else the public interest might suffer. It is certainly not in the public interest to permit a holding company, controlling gas distributing subsidiaries, to use its control of the contracting power of such subsidiaries to create a seeming justification for government authorization of a pipe line designed to invade the markets theretofore served by an existing system under Commission certificates.

Some idea of the confusion which may result from the majority's approach to determining the rights of Panhandle Eastern may be drawn from supply and requirements figures which are of record in this proceeding. These figures will also serve to answer three important questions: (1)

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[7] See record pages 16990-16993.

How well has Panhandle Eastern taken care of the Detroit-Ann Arbor markets? (2) How well is the company prepared to take care of the future growth of these markets and of those of Michigan Consolidated in Western Michigan? and (3) What is the nature of the additional load which Michigan Consolidated proposes to take on in order to justify granting a certificate to Michigan-Wisconsin after according a continuing load to 32,000,000 Mcf a year to Panhandle Eastern?

These significant figures, together with conclusions which may be drawn from them, may be summarized as follows:

(1) In 1946 Panhandle Eastern was obligated to supply the Detroit and Ann Arbor market areas of Michigan Consolidated with a total of 127,000 Mcf of gas per day, representing 33 percent of its total capacity of 383,000 Mcf. The existing pipe line company has further proposed to supply Michigan-Consolidated with a total 154,500 Mcf a day on completion of its "Group B" facilities, again representing 33 percent of its then capacity of 473,000 Mcf per day. Assuming the same percentage of total capacity available to supply the Michigan Consolidated markets when the "Group C" and "Group D" facilities are completed, Panhandle Eastern may be reckoned as planning to provide this market with gas at the daily rate of 239,000 Mcf, representing 33 percent of its then capacity of 725,000 Mcf. This may be taken as the measure of Panhandle [fol. 530] Eastern's plans for this market if permitted to supply its growth.

(2) The delivery of 127,000 Mcf per day throughout the year, with use of storage fields to take care of swings in the load, would provide an annual total of 46,400,000 Mcf, or more than the estimate of 44,818,000 Mcf for the firm requirements of the Detroit and Ann Arbor markets in 1952. Furthermore, it would provide sufficient gas to take care of the total firm requirements of the entire Michigan Consolidated system, including the Western Districts, through 1948 and, if we assume 2,300,000 Mcf still available from local Michigan fields, through 1949. With proper cooperation on a sound storage program, such as the Michigan Gas Storage Company arrangement which Panhandle Eastern has worked out with Consumers Power Company, the firm requirements of the Michigan Consolidated market thus would be adequately safeguarded pending completion

of new facilities already authorized. And it may be noted that the requirement figures include approximately 10,000,000 Mcf a year of industrial load.

(3) If it is argued that in the 1946-1947 winter season Panhandle Eastern at times was unable to deliver to Detroit the full 125,000 Mcf maximum contract demand, it is answered that to date Michigan Consolidated has never made any effort, either through storage or attachment of interruptible industrial customers, to utilize all of the gas offered annually by Panhandle Eastern under its contract. As compared with possible annual delivery to Detroit totalling 45,625,000 Mcf, it took only 26,315,000 in 1942; 4,278,000 in 1943; 31,520,000 in 1944; 32,089,000 in 1945; and 38,500,000 Mcf in 1946. Furthermore, the record shows that during the 1946-1947 winter season Panhandle Eastern has delivered to the Ann Arbor market more than twice the 2,000 Mcf per day required by its contract.

(4) The delivery of 154,500 Mcf. to Michigan Consolidated daily throughout the year upon completion of Panhandle Eastern's "Group B" facilities about January 1, 1949, with proper use of storage fields, would provide an annual total of 56,400,000 Mcf, or sufficient to take care of all the estimated Michigan Consolidated firm requirements, [fol. 531] including the Western Districts, until completion of the proposed "Group C" and "Group D" facilities. The estimated firm requirements of these markets, including from 11,000,000 to 12,000,000 Mcf of industrial load, will be 54,700,000 Mcf in 1951, and 57,300,000 Mcf in 1952.

(5) The delivery of 239,000 Mcf per day to Michigan Consolidated on completion of the "Group C" and Group D" facilities, with proper use of storage fields, would provide an annual total of 87,200,000 Mcf. This would be sufficient to take care of the entire 1952 firm requirements of the system, including the Western Districts, and, in addition, to provide for 30,000,000 Mcf of interruptible industrial sales in addition to the 11,692,000 Mcf of industrial sales included in the firm requirements. Actually, this means provision for a total use of gas in the areas served by the Michigan Consolidated Company, including interruptible industrial sales, in excess of the original Michigan-Wisconsin estimates of such requirements prior to the sudden jump in the estimate of industrial load when the

company decided to recognize Panhandle Eastern as entitled to supply 32,000,000 Mcf a year after expiration of its present contract on December 31, 1951.

(6) In the face of these Panhandle Eastern plans to provide for the reasonable growth of the requirements of areas served by Michigan Consolidated up to a total of 87,200,000 Mcf a year, the latter company has offered Panhandle Eastern, as already noted, a 15-year contract for 32,000,000 Mcf a year after the end of the present contract in 1951. This is 6,000,000 Mcf less than Panhandle Eastern delivered to this company in 1946 and 13,000,000 less than the maximum amount Panhandle Eastern is obligated to deliver and Michigan Consolidated indicated it will take in the final years before that contract expires. It is 24,000,000 Mcf per year less than the amount of gas earmarked for Michigan Consolidated's markets on completion of additional Panhandle Eastern facilities recently authorized by the Commission.

(7) The Michigan-Wisconsin estimates of the requirements of the Detroit market in 1952, submitted in support of its application, show an increase over the actual require-
[fol. 532] ments of 1945 by approximately 55,000,000 Mcf, of which approximately 44,000,000 Mcf represents additional industrial load. For the entire market of Michigan Consolidated the total increase of approximately 62,000,000 Mcf includes an increase of about 46,000,000 Mcf in industrial load. In other words, in the brief span of seven years, the markets' industrial load is to be increased from 11,000,000 Mcf to 57,000,000 Mcf or more than five times that of 1945 to justify the building of the new line.

The figures summarized above are among those which the majority must consider in arriving at a conclusion as to the measure of Panhandle Eastern's rights in the existing market and its expansion. To me they convey a clear indication of the ability and willingness of the company to serve adequately the needs of the market, including the reasonable expansion of its requirements. But, quite aside from the question of rights, these figures appear to me to raise another question, both as to the soundness of the majority decision to authorize a certificate for the Michigan-Wisconsin line, and as to the dependence which can be placed on the applicant's presentation of its entire case. I refer particularly to the treatment of industrial load.

Michigan-Wisconsin initially advanced, as a main argument why the public interest would be peculiarly served by its proposal, the fact that its use of storage fields would make possible high-load factor operation of its main pipe line without the necessity of large industrial sales representing heavy competition with other fuels. So long as their case rested on the assumption that they would be permitted to take the Detroit and Ann Arbor markets completely away from Panhandle Eastern after 1951, they used estimates of interruptible sales almost entirely to provide a market for their gas in the Detroit District from 1948, when they expected to complete their initial project, to the end of Panhandle Eastern's present contract.

Thus, their initial figures show them building up this interim interruptible industrial load in the Detroit District from 2,538,300 Mcf in 1945 to 9,000,000 Mcf in 1946 and 11,400,000 Mcf in 1947, then jumping abruptly to a fixed total of 27,000,000 Mcf for each of the years 1948 to 1951, [fol. 533] inclusive. Thereafter, according to their initial estimates, this load would drop to zero in 1952, although the evidence shows that 13,000,000 Mcf would be available for sale on an interruptible basis. But, in October, 1946, in order to justify a certificate for the new line after alloting 32,000,000 Mcf per year of the market to Panhandle Eastern, Michigan-Wisconsin jumped the 1952 estimate of such interruptible load to 45,000,000 Mcf, but stated that there would be a firm market for this gas.

Insofar, therefore, as the economic soundness of the proposed Michigan-Wisconsin pipe line depends upon its participation in markets now supplied by Panhandle Eastern, its justification rests upon a proposed tremendous increase in industrial sales already referred to. It will mean, according to the applicant's estimates for 1952, that 53,000,000 Mcf, or more than 60 percent of the 87,000,000 Mcf of Southwestern gas consumed in the Detroit market, will be sold to industry, nor does this figure include sales to industry for space heating. It will mean that approximately 57,000,000 Mcf, or 55 percent of the 102,000,000 Mcf sold by Michigan Consolidated in that year, including the Ann Arbor and Western Districts, will be sold for industrial uses. These figures compare with 1945 when less than 30 percent of the gas sold by Michigan Consolidated in either its Detroit, or its entire market, went for such industrial purposes.

Now I am not taking a position against industrial use of natural gas, or against providing for the orderly expansion of such use. But, passing over Panhandle Eastern's right to the first opportunity to provide for the growth of this market, I do not believe it in the public interest to authorize a new line, into the established market of an existing company, when the evidence shows clearly that its justification rests not on orderly growth of the general market but on intensive efforts to expand industrial use through conversion of large industrial plants, including boiler installations, to natural gas.

To the extent that this is true, it means that the Commission is here authorizing new pipe line capacity to provide gas primarily for expansion of industrial use 1,200 miles [fol. 534] from the source of supply, rather than for expansion of general service with expansion of industrial use only incidental thereto. I am convinced that if such a step is to be considered sufficient time should be taken for a full exploration of its consequences.

Because of my fundamental objection to the majority decisions of November 30 and December 30, 1946, as affecting the rights of Panhandle Eastern to supply gas, it is not necessary to discuss other defects in the case presented by Michigan-Wisconsin in support of its application. But one aspect of the case should be noted because of its bearing upon the main issue. The record is so unsatisfactory as to reserve, storage possibilities, deliverability, prospective rates, etc., that it cannot be deemed to support the conclusion that Michigan-Wisconsin can deliver gas to the Detroit area at a sufficiently lower cost than Panhandle Eastern gas to warrant consideration of such alternative source of supply. In fact, when consideration is given to the testimony of Panhandle Eastern that the overall project cost per million cubic feet of capacity would successively decline as each step in the expansion program is completed and to the fact that Panhandle Eastern's rates are subject to this Commission's jurisdiction, it appears that the cost of gas to consumers in the area may well prove to be somewhat higher on account of the authorization of the new line.

The Michigan-Wisconsin case has focused considerable attention on the proposed use of certain Michigan gas fields for storage as an element in the economy of the project. Initially this was offered as an alternative to large interruptible industrial sales as a means of assuring high pipe line

load factor. But, as the more recent proposal involves large sales to industrial customers, this aspect of the case is no longer significant. Suffice it to say that the Commission has already authorized a certificate to Michigan Gas Storage Company under which Panhandle Eastern summer gas may be stored in depleted gas fields relatively near to those proposed to be used by Michigan-Wisconsin. Sound policy might well dictate the integrated use of all such potential storage fields to meet the growing Michigan market.

Reviewing the entire matter it seems to me that the [fol. 535] majority, as a result of pressure for an early decision, have failed to give proper meaning to the word "rights" as applied to Panhandle Eastern's interest in the Detroit area markets. In the regulation of public utilities, rights should signify that assurance on which the owners may depend as a basis for undertaking to live up to their responsibility for an essential public service. They are, in essence, a reciprocal of responsibility. The word "right" is used in the same sense in the phrase "right to a fair return on investment." That means no absolute or abstract right but the assurance of such return as may be necessary to assure continuously the supply of capital required for the rendering of a public service in terms of the public interest.

So, in dealing with the main issue in the case we are passing not so much upon the right of monopoly as opposed to competition as upon the question of mutual dependability as between a public service corporation and the community. Actually, the idea that the granting of a certificate in the instant case will engender competition for supply of gas to the Detroit market area is pretty much an illusion. For the distributing company which contracts for the gas and the parvenu pipe line company will be jointly owned. What little competition might result would be limited to a competitive drive to expand the industrial market for gas, an outcome which may prove definitely questionable in terms of the public interest.

Viewed realistically, interstate pipe line companies serving entire communities, including large city areas, involve fixed investments which are too large to permit a simple application of the competitive principle. Such investments would become practically valueless for service elsewhere if a pipe line company should lose an existing market. An interpretation of Section 7(g) as designed to foster even "regulated competition" (to me a paradox) when an exist-

ing company is rendering adequate service at reasonable rates subject to regulation, would increase the risks of the business to the point of economic unsoundness. Thus in this industry the situation differs materially from that of motor carriers, having little, if any, fixed immovable investment which cannot be diverted to other routes and communities. [fol. 536] No one is contending that a certificate of public convenience and necessity sets up an irresponsible and permanent monopoly, but rather than it permits a continuity of service to a growing market so long as the corporation lives up to its responsibilities as a public utility.

For the reasons set forth herein, I am convinced that the record before us does not warrant a decision to permit a new pipe line to enter the Michigan Consolidated Detroit and Ann Arbor market areas now served by the Panhandle Eastern Pipe Line Company, and therefore that the application of the Michigan-Wisconsin Pipe Line Company should be denied.

Leland Olds, Commissioner.

February 7, 1947. Date of Issuance: February 7, 1947.

PLAINTIFF'S EXHIBIT 23.

United States of America, Federal Power Commission.

In the matter of Michigan-Wisconsin Pipe Line Company. Docket No. G-669.

Supplemental Opinion No. 147-A.

This Opinion is supplemental to our Opinion No. 147, adopted January 17, 1947, and to the order of the Commission dated November 30, 1946, as supplemented by orders of the Commission dated December 14, 1946, and December 30, 1946.

By the order of November 30, 1946, a certificate of public convenience and necessity was issued to the Michigan-Wisconsin Pipe Line Company ("Applicant"). According to subdivision (viii) of paragraph (B) of that order, the certificate was granted upon the express condition that the facilities therein authorized were not to be used for the transportation or sale of gas to the Michigan Consolidated

Gas Company ("Michigan Consolidated") for resale in Detroit and Ann Arbor, Michigan, except with due regard [fol. 537] to the rights and duties of Panhandle Eastern Pipe Line Company ("Panhandle"), in rendering service under its presently existing contracts and in accordance with the provisions of the Natural Gas Act. Such provision also stated that such rights and duties shall by supplemental order be determined on the basis of:

(1) Panhandle's rights, obligations and service under its Grandfather certificate and subsequent certificates when such certificates were granted by this commission;

(2) Panhandle's contractual and actual deliveries of natural gas for resale in the years 1942, 1943, 1944, 1945 and 1946;

(3) Panhandle's rights and obligations at the date of termination of the existing contract, on December 31, 1951.

Jurisdiction was specifically reserved by the Commission to re-open these proceedings for the limited purpose of receiving additional evidence in connection with subdivision (viii) of paragraph (B) of the order. On December 30, 1946, the Commission adopted its order supplementing the order of November 30, 1946, and re-opened the proceedings for the limited purpose of receiving such further evidence as might be available. Pursuant to due notice, a hearing was held commencing on January 15, 1947, and concluding on January 17, 1947. This Opinion will deal briefly with the full record in this proceeding, as thus supplemented, and also with the position stated in the dissenting opinions filed February 3rd and 7th, 1947.[1]

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[1] Since the filing of the Opinion of the majority dated January 17, 1947, the Opinion of Commissioner Draper, dated February 3, 1947, and the Opinion of Commissioner Olds dated February 7, 1947, Panhandle has filed a petition to review in the United States Court of Appeals for the District of Columbia, such review, however, being limited to certain of our orders heretofore issued in this proceeding. As stated in our order of January 14, 1947, Panhandle's applications for rehearing were filed prematurely in that they were filed in advance of the issuance of the opinions referred to above, and the supplemental order herein. Such

[fol. 538] The record shows that the Panhandle system was constructed during the period of 1928-1932. The construction of the main line to a point near Indianapolis, Indiana, with a branch line from that point to a connection near Muncie, Indiana, with the Ohio Fuel Gas Company was completed in 1931. Beginning in 1932 Panhandle operated its system as then constructed until its main line was extended from Indianapolis, to Detroit, Michigan, in 1936. At that time service was first rendered from such system to Michigan Consolidated's predecessor in interest, the Detroit City Gas Company.

On April 17, 1942, Panhandle and its then wholly owned subsidiaries, Illinois Natural Gas Company ("Illinois Natural") and Michigan Gas Transmission Corporation ("Michigan Gas"), filed a joint application for a "grandfather" certificate pursuant to Section 7(c) of the Natural Gas Act. Panhandle, as successor in interest to Illinois Natural and Michigan Gas, on February 14, 1945, withdrew from consideration of the Commission such parts of the application as referred to the operations in which Illinois Natural with the operation of the Panhandle system as it existed on February 7, 1942. On October 17, 1945, the commission issued a "grandfather" certificate to Panhandle in Docket No. G-254 with respect to the operations of the company as of February 7, 1942.

In considering the matter at hand it is necessary, of course, to refer first to Panhandle's rights, privileges, obligations and service under its "grandfather" certificate as such certificate related to the Detroit and Ann Arbor dis-

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applications were denied without prejudice to the filing of proper applications for rehearing within 30 days of the issuance of such opinions or supplemental order, whichever is the later, as contemplated in the Commission's order of November 30, 1946. Thus, we have endeavored throughout this entire proceeding to do nothing which will deprive any of the parties herein from receiving all of the opinions and orders of the Commission. We believe that any other procedure would be prejudicial to the rights of all the parties herein. The issuance of our supplemental opinion and order herein, completes the action contemplated in paragraph (C) of the November 30, 1946 order. Therefore, the filing of Panhandle's petition to review is, under the circumstances, premature.

tricts as of February 7, 1942. The question of such rights, privileges and obligations arising under "grandfather" certificates has been discussed by the courts in connection with Section 206(a) of the Interstate Commerce Act, from which the 1942 amendment of Section 7(c) of the Natural Gas Act had its derivation. In the case of United States v. [fol. 539] Carolina Carriers Corp., 62 S. Ct. 722, the Court stated that this "standard carried the connotation of substantiality." In Alton RR Co. v. United States, 62 S. Ct. 432, it was held that the purposes of the "grandfather" provision was to insure "substantial parity between future operations and prior bona fide operations," and that a "grandfather" certificate should not necessarily restrict future operations to the precise points of areas already served.[2]

The rights and privileges regarding "grandfather" and "non-grandfather" certificates, as developed by the courts with respect to Section 7 of the Natural Gas Act, have been in keeping with the law as laid down in matters relating to the Interstate Commerce Act. Recently this general subject was considered by the United States Circuit Court of Appeals for the Sixth Circuit, with specific relation to Section 7 of the Natural Gas Act, in Kentucky Natural Gas Corporation v. Federal Power Commission, et al., decided on January 20, 1947.

In that case the facts showed that the Central Illinois Public Service Company ("Central Illinois") had been receiving its gas supply for the Mattoon, Illinois, area from Kentucky Natural Gas Corporation ("Kentucky Natural") since 1932. In order to augment its supply of gas Central Illinois proposed the construction and operation of a pipeline to connect with the pipeline system of Panhandle, thus effecting a substitution of gas supply. Kentucky Natural objected to the issuance of a certificate to Central Illinois mainly on the ground that its ability to render adequate service at reasonable rates in its remaining areas would be jeopardized by the loss of its sales to Central Illinois. Kentucky Natural also contended that while Central Illi-

[2] See also Howard Hall Co. v. United States, 62 S. Ct. 732, 734.

nois was earning a fair return on its rate base Kentucky Natural was operating at a loss.

The Commission dismissed Kentucky Natural's application to construct facilities similar to those proposed by Central Illinois and granted the application of the latter.

The Circuit Court of Appeals in affirming the order of the Commission held that the Natural Gas Act did not confer on [fol. 540] Kentucky Natural the exclusive right to continue service to the Mattoon area. In discussing this question the Court also stated that:

"On the contrary, § 717(g) Title 15 USCA appears to specifically recognize the right of the Federal Power Commission to issue a certificate of public convenience and necessity to a competitor, by providing 'Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural gas company.' See Arkansas Louisiana Gas Company v. Federal Power Commission, 113 Fed. (2d) 281 (C. C. A. 5th)."

Panhandle has asserted that by reason of its "grandfather" certificate it has an exclusive legal right to serve the Detroit area, including a prior right to serve future market requirements.[3] As we have heretofore held, we cannot agree that the issuance of a "grandfather" certificate grants any such rights, for the provisions of the Natural Gas Act do not expressly or impliedly confer upon any company an exclusive right to serve a specified area.

A "grandfather" certificate, like a "non-grandfather" certificate, which is issued only upon the furnishing of proof, is governed somewhat by valid contractual arrangements, not contrary to the public interest, a natural gas company as a supplier and a distributing company as its customer have entered into.[4] For instance, the mere fact

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[3] This contention was rejected by the unanimous action of the Commission in its order of November 30, 1946, denying the motion of Panhandle to dismiss the application of Michigan-Wisconsin. The Commission on January 14, 1947, also unanimously denied Panhandle's application for rehearing of such order of November 30, 1946.

[4] Cf. page 9 of Commissioner Olds' dissenting opinion.

that Panhandle has a "grandfather" certificate does not mean that it can pre-empt a market served by it for continued rendition of service beyond the term of an existing contract to the exclusion of others who may show that the public interest would be served by either a substitution or necessary augmentation of service or both. The needed supplementation of gas supply[5] in a general region or a [fol. 541] particular area in the public interest, apparently recognized by Commissioner Olds in his dissenting opinion, is an ingredient of the public convenience and necessity which this Commission is under obligation to consider in issuing certificates under Section 7 of the Act. Furthermore, Section 7(g) of the Act applies whether a company operates pursuant to a "grandfather" or a "non-grandfather" certificate.

It seems clear that any privileges conferred by a "grandfather" certificate issued under the Natural Gas Act should not, as a matter of law, be extended beyond "substantial parity" with the operation, service, transportation or sale actually performed on February 7, 1942. It follows that any additional operation, service, transportation or sale of natural gas, subject to the jurisdiction of the Commission, not clearly covered by an existing "grandfather" certificate must be approved by a "non-grandfather" certificate.

A "grandfather" certificate obviously is not intended to be unlimited but, rather, is subject to future regulation under the provisions of the Natural Gas Act. In other words, assuming the termination at any specified date of an existing contract with Michigan Consolidated, Panhandle could not assert that its "grandfather" certificate permits it to pre-empt territory and service privileges without submitting to the test of broad public interest. Although the obligation to continue to serve might be required, in the public interest, unless and until its abandonment or reduction were authorized by the Commission, regulation might be defeated if the Commission permitted a natural gas company to escape the public interest test by urging extreme claims under the "grandfather" clause of the Act.

The Commission has been mindful of the tremendously accelerated demands for natural gas made upon Panhandle

[5] Cf. page 9-10 of Commissioner Olds' dissenting opinion.

by its many domestic, commercial and industrial consumers in Kansas, Missouri, Illinois, Indiana, Ohio and Michigan. It has approved all the applications thus far presented by Panhandle for authorization of construction and operation of facilities to increase its system capacity. Although the Commission has approved such applications resulting in [fol. 542] increased capacity, even so Panhandle—in common with other natural gas companies, was pointed out in the dissenting opinion of Commissioner Olds (pages 3 and 4)—has been unable under prevailing conditions to meet the ever-increasing demands upon its system as a whole.

In the Commission's Opinion No. 130, adopted March 14, 1946, it was pointed out that Panhandle's first major application to increase its system sales capacity was filed on February 25, 1943 (Docket No. G-452). In that application Panhandle submitted for the approval of the Commission the first part of its overall looping program, which consisted of looping its main transmission pipeline system for the purpose of increasing its system sales capacity in order to meet the requirements of new customers, comprising three distributing companies in Michigan, other than Michigan Consolidated and one distributing company in Illinois, and to satisfy the increased natural-gas requirements of other customers.

In reviewing the several applications filed by Panhandle to enlarge its pipeline facilities, the Commission in Opinion No. 130 stated:

"Following this application (Docket No. G-452), Panhandle filed applications on March 25, 1943 (Docket No. G-459), April 24, 1944 (Docket No. G-543), and February 2, 1945 (Docket No. G-620), requesting authorization to construct and operate additional pipe line facilities consisting of extensive loop lines, additional compressor units aggregating 33,100 horsepower, appurtenant facilities and valve changes on its pipe line system.

"Panhandle in the several proceedings with respect to such applications, has represented to the Commission that such proposed construction is necessary in order to assure the continuity of adequate service and satisfy the needs of customers attached to its system or proposed to be served under contracts submitted in evidence during those hearings.

"The Commission, in authorizing the construction and operation of the facilities applied for by Panhandle begin-
[fol. 543] ning 1943, recognized the need for such facilities in order that Panhandle might meet its existing obligations and maintain adequate service in the markets it had committed itself by such applications to serve. One of the important markets now served by Panhandle is Ohio, where, in recent years, an urgent need has been shown for additional supplies of gas. As a result of such showing, the Commission authorized major additions to Panhandle's interstate transmission system in order that large quantities of natural gas may be delivered to the East Ohio Gas Company and Ohio Fuel Gas Company.

"The constant growth of the markets served by Panhandle required this Commission, in dealing with the numerous applications filed by the Company with the Commission, to consider the effect of the Company's future operation of such facilities on customers which it had already obligated itself to serve. The Commission, therefore, on March 27, 1945 in authorizing the construction and operation of additional facilities by Panhandle to maintain its system sales capacity, provided that the facilities therein authorized should not be used for either the transportation or sale of natural gas, subject to the jurisdiction of the Commission, to any new customers except upon specific authorization by the Commission.

"In its Opinion and Order adopted March 31, 1945 the Commission authorized Panhandle to construct and operate additional facilities in order to increase its system sales capacity by 50,000 Mcf for the purpose of meeting its market requirements. . . ."

During the present winter season of 1946-1947, a critical situation existed on Panhandle's system, resulting in the adoption of the Commission's order dated December 12, 1946 (Docket Nos. G-200 and G-207). Panhandle was unable during the present winter period to meet its entire firm demands. It therefore voluntarily filed "Emergency Service Rules and Regulations" to govern deliveries of natural gas by it when curtailments of deliveries were necessary during the winter season of 1946-47. The rules and regulations which were by said order sanctioned and permitted to become effective, were the result of hearings and cooperative
[fol. 544] conferences between Panhandle, its customers,

and representatives of the Federal Power Commission and the State regulatory commissions of Missouri, Illinois, Indiana, Ohio and Michigan. It appears that the curtailment on Panhandle's system during this present winter period has been extremely severe. In determining Panhandle's pattern of service in the Detroit and Ann Arbor districts, the situation as it prevailed in the winter of 1944-45 [6] and in the present winter cannot be overlooked or brushed aside.

Moreover, due to the present serious gas shortage throughout the area served by Panhandle, it has been allocated 20,000 Mcf of natural gas per day from the Big Inch and Little Big Inch Pipe Lines in order to further alleviate the situation and meet its firm gas demands.[7]

The forecasts of a witness for Panhandle show that for the years 1950 and 1951, it will probably ultimately be necessary for Panhandle to construct a third loop line which, when fully powered, will result in a daily system capacity of approximately 725,000 Mcf. Such project has been separated by the company into Groups A, B, C and D.

Commissioner Olds in his dissent claims that some idea of the confusion which may result from our action may be drawn from certain figures in the record. We believe that if any confusion exists it is not because of the majority action but rather, it is due to the conjectural and misleading statements contained in pages 10, 11, 12 and 13 of his dissent, which have no basis in fact but rest on assumption only.

The "significant figures" assume that when the "C" and "D" facilities are in operation Panhandle "may be reckoned" as "planning" to provide Michigan Consolidated with 239,000 Mcf every day, which "may" be taken as the measure of Panhandle's plans for this market if permitted to supply its growth. In the first place, there is absolutely no basis in the record for assuming that Panhandle plans to provide such a volume of gas for Michigan Consolidated. [fol. 545] Upon what basis such a statement could be made we are unable to determine. Further, to assume that Panhandle will supply 239,000 Mcf at a daily rate to Michigan

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[6] See Opinion No. 130, Docket Nos. G-661 and G-668.

[7] Allocations as authorized and directed by Commission in telegrams of December 21, 1946, and February 3, 1947 (Docket No. G-824).

Consolidated appears contrary to the evidence of record. Moreover, any additional gas Panhandle might have available during the summer periods appears not to have been earmarked for Michigan Consolidated but for the Union Gas Company of Canada and Michigan Gas Storage Company. With respect to the latter company, the record shows that Consumers Power Company had negotiated for about a year to get additional gas from Panhandle especially for storage purposes and apparently only succeeded in its endeavor by forming the Michigan Gas Storage Company and issuing 25% of its stock to Panhandle.

Commissioner Olds in building up his figures to a point where Panhandle "plans" to provide 87,200,000 Mcf annually for Michigan Consolidated does so in a very interesting manner. However, the conclusions reached must of necessity be rejected because they are not based upon the facts of record. Further, such "planning" fails to indicate in what manner Panhandle will satisfy the demands of its other markets.

It is also assumed that in supplying 87,200,000 Mcf. per year to Michigan Consolidated about 41,692,000 Mcf. would be used for industrial purposes—a business which Panhandle time after time has stated it preferred to serve itself. The dissent then states that "In the face of these Panhandle Eastern plans to provide for the reasonable growth of the requirements * * * up to a total of 87,200,000 Mcf. a year" Michigan Consolidated has offered a contract for 32,000,000 Mcf. a year. In view of the fact that Panhandle has presented no plans in this or any other proceeding to supply 87,200,000 Mcf. of gas annually, we, perhaps, can indulge in an assumption more in keeping with the evidence and state that Panhandle has shown no desire to sell such quantity of gas to Michigan Consolidated.

The majority is, therefore, unable to agree with such dissenting opinion that we must give weight to the figures presented in considering the rights of Panhandle in its existing markets in Detroit and Ann Arbor. Hypothetical [fol. 546] figures for future periods do not convey to us "a clear indication of the ability and willingness of the company [Panhandle] to serve adequately the needs of the markets, including the reasonable expansion of its requirements."

The group A facilities which were authorized by the *Commission* on June 4, 1946 (Docket No. G-706), will in-

crease the present pipeline capacity of Panhandle by 10,000 Mcf. per day, resulting in a total daily capacity of 393,000 Mcf. The addition of the Group B facilities, which were authorized by the Commission on November 30, 1946 (Docket No. G-706), will add an additional 80,000 Mcf. of daily capacity resulting in a total system capacity (including A and B, plus the present system) of 473,000 Mcf. per day.

According to Vice President Morton, in charge of operations of Panhandle, in order for his company to supply its market requirements for the winter periods 1947-48 and 1948-49, it will be necessary to install the A and B facilities,[8] and in order to meet the requirements for 1949-50 and 1950-51, the suggested C and D facilities will have to be installed and in operation. Even now, no application or firm proposal with reference to the construction and operation of the suggested C and D facilities has been filed with the Commission. In the dissenting opinion of Commissioner Olds (page 3), there is an inference that in December 1945 the Commission requested Panhandle specifically to "advise" it of its expansion plans in connection with the "C" and "D" facilities. The "request" referred to was an industry-wide letter sent to all the natural gas companies in the country, and, in addition to other matters, referred to the fact that natural gas companies should plan their construction programs for the reasonable future so as to avoid the filing of multiple applications involving portions of what are essentially single-extension projects. Such letter also suggested that timely application for authority to construct new facilities will reduce so-called emergency applications and thus provide for adequate capacity and service.

[fol. 547] Obviously whether facilities to provide the enlarged capacity will actually be presented to, or authorized by, the Commission and, if approved, when they might be placed in the public service or where such gas might be delivered, is, to say the least, conjectural. It might be noted, however, that the application for the A and B facilities was not filed until March 21, 1946, which was approximately six months after the filing of the application of

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[8] The estimated cost of constructing such facilities is approximately $30,272,000.

Michigan-Wisconsin herein and more than a year after the first filing of a similar proposal by the latter's affiliate, American Light and Traction Company, on February 19, 1945.

The tremendous demands for natural gas on Panhandle's system is not unusual. In this connection it is noted that in our Opinion No. 133 and order adopted May 10, 1946, in Docket No. G-651 In the Matter of Natural Gas Pipeline Company of America and Texoma Natural Gas Company, it was stated that "Natural's daily pipeline capacity on an 'as metered basis' (1040 Btu) is 268,000 Mcf. The new facilities proposed will increase that capacity by 81,000 Mcf. to a total capacity of 349,000 Mcf." The cost of such facilities is estimated to be $19,231.075.

With reference to reserves then available to Natural Gas Pipeline Company of America ("Natural"), the Commission found that: "From the evidence of record in this case it therefore appears that Canadian River has ample reserves and potential deliverability to supply its contractual 25% of the requirements of Natural including the increases contemplated in this proceeding (Docket No. G-651) well beyond 20 years in the future. But it also appears that while Texoma has reserves which are adequate to fulfill its obligation to supply 75% of Natural's increased annual and daily requirements into 1950, there are clear indications that it may not be able after 1960 to provide the daily quantities of gas which are necessary to supply 75% of Natural's increased requirements."[9]

[fol. 548] In our order of January 28, 1947, in Docket No. G-771, we authorized the construction and operation of certain facilities which when installed will increase Natural's capacity to 484 million cubic feet; "and that such capacity will be required by Natural to meet the estimated peak day sales requirements of Chicago District Pipe Line

[9] Cf. G-531 and G-544, Interstate Natural Gas Company, Inc. (1944) 4 F.P.C. 625, 626 certificate permitting extension of facilities where life of reserves estimated at 12-13 years; G-443, G-306, G-307, and G-308, Southern United Gas Co., et al. (1943) 3 F.P.C. 436 certificate permitting acquisition of facilities where known reserves sufficient for 15-20 years; G-442, Lone Star Gas Company (1944) 4 F.P.C. 565 certificate to successor company where life of reserves estimated at about 15 years.

Company and distributing utilities dependent upon Natural for their supply of gas during the winter season of 1948-49." Estimated peak day requirements for the winter seasons of 1949-50 "will be slightly in excess of 510 million cubic feet, indicating that further increases in facilities will be required by that time unless greater capacity than now estimated is realized by reason of the complete looping of Natural's main transmission lines." The cost of such facilities is estimated to be $23,493,987.

In attempting to consider the merits of the case, the dissenting opinions appear to view the whole proceeding as presenting something in the nature of a private feud between two companies. Even if true, such a view ignores completely the rights and interest of the public generally and especially the interest of the public in areas other than Detroit and Ann Arbor, Michigan. There are other markets proposed to be served by Michigan-Wisconsin, including the large Wisconsin market which is also an important factor in this case. In considering the proposals involved we have given equal attention to all the markets which will benefit from the service proposed to be rendered by Applicant—to do otherwise is to neglect the broad public interest.

Moreover, in so far as the Detroit and Ann Arbor markets are concerned, our action should not be viewed as that of creating "regulated competition" only, but rather more in the nature of a needed supplementation of gas supply. We cannot agree with Commissioner Olds that our action should have been postponed until reconversion problems are over. If the Commission followed a policy of that sort in respect of the more important certificate cases, we could be charged with a disregard of the great public demand for natural gas service in the areas presently served by the large pipeline companies. Further, there are also practical con- [fol. 549] siderations involved, such as the practice on the part of the rolling mills not to "firm" an order unless a certificate has been issued by the Commission, and the question of what would happen to dedicated reserves during such an intervening period.

Although it does not appear clear from the record that Panhandle will actually sell to Michigan Consolidated the maximum annual quantities called for under its present contracts prior to their expiration, we find that, if called upon to deliver such maximum quantities, Panhandle should

not only be given the opportunity to satisfy such demands, but is in fact contractually obligated to do so. Whether it will have the capacity available to serve such maximum annual quantities is doubtful because of its present firm commitments, the increasing system-wide demands and the obligations under certain circumstances to deliver substantial quantities of gas to the Union Gas Company of Canada (Docket Nos. G-612 and G-619) and the Michigan Gas Storage Company (Docket No. G-731).

In relation to Panhandle's commitment of annual deliveries to Michigan Gas Storage Company under its contract in evidence in that proceeding, Panhandle has agreed to deliver in lieu of its deliveries under a contract with the Consumers Power Company calling for a maximum annual delivery of 9,125,000 Mcf. of gas, an amount which may equal or exceed 33,000,000 Mcf. or a potential increase of almost 24,000,000 Mcf. or more above its prior commitments to Consumers Power.

It also appears that Panhandle's growing markets in Missouri, Illinois, Indiana, Ohio, and Michigan will require increased quantities of gas equal to or exceeding in amount the annual volumes of gas sold to Michigan Consolidated. In fact, the growth has been so acute that it has been necessary for the regulatory bodies of certain of the states to initiate orders permitting restrictions being placed upon the distribution of natural gas for spaceheating purposes.

Thus, Panhandle's market requirements are increasing so rapidly that it may experience some difficulty in making adequate provisions for meeting such demands. There can [fol. 550] be no doubt that in the light of the record facts that in the event Panhandle discontinued its sales in the Detroit and Ann Arbor areas after December 31, 1951, its present and future demands and other available markets will readily absorb the quantities of gas sold to Michigan Consolidated.

We believe it is purely speculative to say that our action in this case, construed as an expression of policy, introduces a new financial risk which might necessitate the raising of the rate of return of Panhandle. There is no reason on the basis of the action which we have taken to consider that Panhandle has been so affected as to require an increased rate of return. Due to the tremendous demands upon its system for natural gas service, its financial reports show higher earnings year after year, with 1946 the

best in its history. Further, there is no showing in the record of prospective financial loss to Panhandle in the event of a modification of its present deliveries in the Detroit and Ann Arbor markets. Neither should our action be construed as removing from Panhandle, or any other natural gas company, their so-called "protected established markets." Panhandle, like others, now has large established markets with great potential growth.

In this proceeding we have endeavored to point out that, although Panhandle has no exclusive right to serve a market for all time and thus claim a monopoly, a certain continuity of service should be preserved if possible. Thus, there is no intention on the part of the Commission herein to modify, terminate or set aside any certificate heretofore issued by the Commission to Panhandle. Therefore, we are unable to agree with Commissioner Draper that "the 'reasonable protection' to which Panhandle is entitled is denied."[10]

We believe that management, in the exercise of its business judgment must be free to make effective such operating practices as are necessary in rendering service to the public. Here, Panhandle appears to be faced with many problems, some of which it has attempted to cope with in the best manner possible and others which it may find can [fol. 551] be solved only by the taking of such action as appears necessary in order to lighten the burden which it has been carrying for some period of time.

It is our opinion and we so find that Panhandle's rights and desire to serve natural gas for resale in the Detroit and Ann Arbor districts up to December 31, 1951, should be governed by the pattern of service rendered by it, particularly since December 15, 1940,[11] and also by the obligations imposed upon it by its existing contracts with Michigan Consolidated.

We also find that the issuance of a certificate of public convenience and necessity to Michigan-Wisconsin should not be construed as indicating that Michigan Consolidated may disregard the obligations imposed upon it according to such contracts or that our action affects any obligation on the part of both companies to render adequate and con-

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[10] Page 2 dissenting opinion, Commissioner Draper.

[11] Effective date of Fourth Supplement to Panhandle's original contract dated August 31, 1935.

tinued service to the consumers in the Detroit and Ann Arbor districts. Further, the continuance of gas service to Michigan Consolidated should be in keeping with Panhandle's ability to render adequately such further service in the best manner possible, and with recognition of its obligation to meet the full demands on its system in Kansas, Missouri, Illinois, Indiana, Ohio and Michigan.

The Commission, in issuing the certificate herein, expressly conditioned the granting of such certificate so that the facilities could not be used for the purposes intended "except with due regard to the rights and duties of Panhandle in its established service for resale in Detroit and Ann Arbor, Michigan, under its presently existing contract with Michigan Consolidated, and in accordance with the provisions of the Natural Gas Act."

Commissioner Olds in his dissenting opinion, at page 8, states that our order of November 30, 1946, is fundamentally defective to the extent that it fails to make a definitive finding as to Panhandle's rights in the market served by Michigan Consolidated. In considering the rights of Panhandle in this matter we have at all times attempted to rec- [fol. 552] ognize among other things that managerial discretion plays an important role in the operation of a large pipeline system. A forecast of what the future will bring must, of necessity, be clothed with some uncertainty. The markets may develop to a greater extent than supposed. Further, Panhandle's future plans are not absolutely certain. It hopes to render service to Canada, increase supplies in other markets and serve new customers. However, until Panhandle is able to do what it believes it must in rendering such public service, we believe it most unwise in the meantime to place the company in an unfair or unfortunate position. Therefore, a finding relating to what will happen many years in the future can be no more definitive than the future itself.

The evidence which was offered by Michigan-Wisconsin and received in this re-opened proceeding relates directly to the main interest of the intervener, Panhandle, in the entire proceeding—namely, in what manner, if any, it will be affected by the Commission's action in issuing a certificate to Michigan-Wisconsin.

An important item of evidence received in the re-opened proceeding was the contract, Exhibit No. 563. This exhibit is significant because (1) it is a contract which was offered by Michigan Consolidated to Panhandle for a term of

15 years beyond the term of the present contract; (2) it affords to Panhandle highly favorable load factor (100%) conditions under which it will deliver gas to Michigan Consolidated; (3) a contract is available which would substantially preserve, safeguard and continue in effect the rights and privileges of Panhandle; and (4) by its terms, Panhandle's pattern of service, especially as existing at the time its "grandfather" certificate was issued, remains unchanged and unimpaired.

In complying with the condition imposed in paragraph (B), sub-division (viii), the Applicant has recognized and responded to this condition in its certificate by offering through its affiliate a new long-term contract to Panhandle. This contract would take effect on the expiration of the present one between Michigan Consolidated and Panhandle. The offer of such contract may be considered as a bona fide [fol. 553] desire on the part of Michigan Consolidated to furnish a manner of protection to whatever rights Panhandle might have in rendering service to Michigan Consolidated.

In this connection Commissioner Olds states that the re-opened proceeding brought out no more evidence than a copy of a proposed contract offered by Michigan Consolidated and "an attempt to bring pressure on the latter company to accept this contract as a measure of its rights." We believe the record fails to prove any such statement. Panhandle knew that the purpose of holding a further hearing was to hear evidence in respect of its rights, duties and obligations. What the record shows is an attempt to obtain an expression of opinion from Panhandle regarding the contract and the terms thereof.

Panhandle had the opportunity to be heard in the matter of its pattern of service and whether the proposal of Michigan Consolidated would have the effect of recognizing and preserving its rights. The Commission can do no more than offer to all participants the opportunity to be heard. Once that opportunity is afforded, it is then a matter for the sole determination of a party whether it desires to present evidence or not.

During the course of the re-opened proceedings on January 15-17, 1947, although Panhandle participated in such proceedings and was permitted by the Trial Examiner to incorporate in the record by reference certain orders and opinions of the Commission, it nevertheless, did not submit any witness or present any additional evidence. It also de-

clined to express in clear and unmistakable terms its views regarding the acceptability of the proposed new contract.

The record shows that Panhandle delivered to Michigan Consolidated for consumption in the Detroit and Ann Arbor districts approximately 26,729,000 Mcf in 1942;[12] 32,540,000 Mcf in 1945[13] and 39,230,000 Mcf in 1946. Under its contracts with Michigan Consolidated, Panhandle's obligation is to deliver up to 45,625,000 Mcf annually for resale in De- [fol. 554] troit and 730,000 Mcf for resale in Ann Arbor. Michigan Consolidated, on the other hand, is obligated to take or pay for approximately 21,000,000 Mcf annually for Detroit and 292,000 Mcf annually for Ann Arbor. In addition, Panhandle is obligated to deliver upon demand of Michigan Consolidated any quantity of gas up to 125,000 Mcf on a daily basis for the Detroit district. It is recognized that under such contracts the Michigan Consolidated load is subject to great fluctuations which places upon Panhandle many operating problems by reason of its obligation to have available, upon demand, widely varying volumes of gas. It appears to us that the new contract offered to Panhandle by Michigan Consolidated eliminates almost entirely any of such operating problems as the deliveries under such contract would be on an equal hourly or daily basis.

We, therefore, find that there is available to Panhandle an opportunity to continue to make deliveries of gas to Michigan Consolidated after December 31, 1951, on terms and conditions not only substantially similar to those now in effect but in many respects more favorable to Panhandle.

We further find, as a result of our action in issuing a certificate of public convenience and necessity to Michigan-Wisconsin that:

(1) Panhandle's pattern of service relating to Michigan Consolidated and existing as of February 7, 1942, the effective date of the "grandfather clause" of the Natural Gas Act, is unaffected;

(2) Panhandle's pattern of service as existing at the time of issuance of its "grandfather" certificate, is unaffected;

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[12] Effective year of the amendment to Section 7 of the Natural Gas Act and year in which Panhandle filed its application for a grandfather certificate under the amended section.

[13] Grandfather certificate issued October 17, 1945.

(3) Panhandle's pattern of service under its existing contracts is preserved;

(4) Panhandle's obligation under existing contracts to deliver gas to Michigan Consolidated up to the contract maximum thereof remains unchanged;

(5) Upon the termination of its contracts with Michigan Consolidated, Panhandle is given the opportunity to deliver and sell gas to it in keeping with its pattern of service for either the year 1942 or 1945, or the average annual volume [fol. 555] delivered and sold to Michigan Consolidated during the five-year period 1942 through 1946; and

(6) In the event Michigan Consolidated is in need of additional gas over and above the quantities served by Panhandle and Michigan-Wisconsin, Panhandle be given the opportunity to deliver and sell such additional gas as may be required in order to maintain adequate service in the Detroit and Ann Arbor markets.

An appropriate order will be entered in conformity with this opinion.

Nelson Lee Smith, Chairman. Richard Sachse, Commissioner, Harrington Wimberly, Commissioner.

Commissioners Draper and Olds dissenting. Commissioner Olds will file a dissenting opinion.

Dated at Washington, D. C. This 20th day of February, 1947. ——, Secretary.

Date of Issuance: March 12, 1947.

United States of America. Federal Power Commission.

Before Commissioners Nelson Lee Smith, Chairman; Claude L. Draper, Leland Olds, Richard Sachse and Harrington Wimberly

February 20, 1947.

In the Matter of Michigan-Wisconsin Pipe Line Company

Docket No. G-669

Order Supplementing Order Issuing Certificate of Public Convenience and Necessity

Upon consideration of the record herein, the Commission's Opinion No. 147, the order of November 30, 1946, issuing a certificate of public convenience and necessity, to the [fol. 556] Michigan-Wisconsin Pipe Line Company, the order of December 30, 1946, supplementing such order and the Commission's supplemental Opinion No. 147-A adopted this date, all of which are hereby referred to and made a part hereof, the Commission, supplementing its order of November 30, 1946, and particularly Paragraph B, subparagraph (viii) thereof, orders:

(A) That the facilities herein authorized shall not be used for the transportation or sale of natural gas in the Detroit and Ann Arbor areas of Michigan except upon the following terms and conditions:

(1) That Panhandle is permitted to deliver natural gas to Michigan Consolidated in accordance with the terms and conditions of its existing contracts during the life of such contracts, and

(2) That upon the termination of such contracts, and upon mutually satisfactory terms, Panhandle is afforded reasonable opportunity to deliver and sell to Michigan Consolidated not less than the annual volumes of gas delivered and sold by it for either the years 1942 or 1945 or the average delivered for the five-year period 1942 through 1946. Further, Panhandle shall have the right to participate in the future growth of the Detroit and Ann Arbor markets by being given the opportunity to deliver and sell such additional volumes of gas to Michigan Consolidated as the latter may require in excess of the volumes of gas then being contractually purchased by it from Panhandle and Michigan-Wisconsin, in order to maintain adequate service to consumers in the Detroit and Ann Arbor districts.

(B) The foregoing conditions are without prejudice to the filing of applications by either Panhandle, Michigan-Wisconsin or Michigan Consolidated for modification or ter-

mination thereof provided, however, that Panhandle's pattern of service as herein outlined shall not in any manner be affected by the Commission's action upon such application so long as Panhandle is able and willing to maintain adequate service in conformance therewith.

[fol. 557] By the Commission. Commissioners Draper and Olds dissenting.

Leon M. Fuquay, Secretary.

Date of Issuance: March 12, 1947.

PLAINTIFF'S EXHIBIT 24

United States of America. Federal Power Commission.

In the Matter of Michigan-Wisconsin Pipe Line Company

Docket No. G-669

Olds, Commissioner, dissenting:

The supplemental opinion (No. 147-A) of the majority adds practically nothing of substance to the original majority pronouncement. But I must comment briefly on certain of the majority's statements which appear designed to dodge the impact of my previous dissent.

For instance, on pages 7 and 11, the impression is given that the main issue is whether additional capacity to serve the Detroit and Ann Arbor markets is required by the public convenience and necessity. Actually, the issue is whether Panhandle Eastern has so failed to meet its responsibilities as to warrant awarding a certificate for the supplying of the additional requirements to an untried, inexperienced supplier instead of to the company which has built up the markets and, under certificates authorized by Congress and this Commission, has met the requirements under difficult circumstances.

From a reading of the majority's supplemental opinion one would draw the conclusion that the Michigan-Wisconsin Company could jump into the breach and, by the next winter season, provide the additional gas necessary to meet the increasing demands which the difficulties of the immediate postwar years have prevented Panhandle Eastern, along with many other natural gas companies, from fully meeting.

Nothing could be farther from the truth. Panhandle Eastern will actually be making good those shortages before [fol. 558] Michigan-Wisconsin can get its line in operation. The record indicates that the new company is not likely to begin deliveries before 1950 or 1951.

The majority supplemental opinion promulgates the rather extraordinary doctrine as to "grandfather" certificate rights that "assuming the termination at any specified date of an existing contract with Michigan Consolidated, Panhandle could not assert that its 'grandfather' certificate permits it to preempt territory and service privileges without submitting to the test of broad public interest."[1]

Does this mean that a certificate, issued by this Commission pursuant to the mandate of Congress, terminates with the private contract in effect at the time of its issuance? Or does it mean that such a certificate is subject to reconsideration on the termination of the private contract whereupon the natural gas company must again come in and prove public convenience and necessity? The questions are important in the light of the following standard provision of all certificates issued by this Commission:

"This certificate shall be effective as long as applicant continues the operations hereby authorized in accordance with the provisions of the Natural Gas Act, as amended, and any pertinent rules, regulations, or orders heretofore or hereafter issued by the Commission."

The majority ought to advise future applicants, before they do any financing pursuant to a certificate, whether the phrase "orders heretofore or hereafter issued" is meant to include orders permitting a new pipe line to enter the market except on a clear showing that the existing supplier is unable or unwilling to meet its requirements.

The majority adds to its rather novel interpretation of "grandfather" certificates with the further observation: "Although the obligation to continue to serve *might* be required, in the public interest, unless and until its abandonment or reduction were authorized by the Commission, regulation might be defeated if the Commission permitted a [fol. 559] natural gas company to escape the public interest

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[1] Cf. Statement of Mr. Shannon, Counsel for Michigan-Wisconsin Pipe Line Company, on page 20 of this opinion.

test by urging extreme claims under the 'grandfather' clause of the Act." (Emphasis supplied.)

This seems to me to be the acme of loose thinking. It apparently results from the effort of the majority to yoke together their determination to justify a certificate to Michigan-Wisconsin and the cold fact that Panhandle Eastern alone must be called upon to meet the requirements of the Detroit market during the really critical years. This places them in a contradictory position because they are forced to find some sort of failure to meet these requirements as grounds for permitting the invader to enter. Actually there is no "might" about the requirement of continued service until abandonment is permitted. Furthermore, the public interest will not be served by such a one-sided application of the responsibility-privilege equation, the balancing of which is essential to sound utility service.

No one, neither Panhandle Eastern itself, nor the dissenting Commissioners, nor the City of Detroit, nor the Kansas Commission, is asking that a natural gas company be permitted "to escape the public interest test." Under the very concept of public utility service, that is not a test applied only at the time of issuance of a certificate but a continuing test which every public utility must meet in a very practical way every day of its life. What I am urging, and what Panhandle Eastern is urging, is that an important purpose of regulation shall not be defeated by arbitrary action devoid of substantial proof that the utility presently rendering service is not reasonably meeting that test. There is no extreme claim in this.

Adjectives Are No Answer to Figures Based on Record

The majority are apparently troubled by the figures set forth in my previous dissenting opinion, for they attempt to deal with them not by going to the substance but by using such adjectives as "conjectural" and "hypothetical." The figures were prepared at my request by the Commission's Gas Certificates Division on the basis of detailed compilations from the record. They rest on two simple assumptions (1) that, if the responsibility of supplying the grow- [fol. 560] ing Michigan Consolidated market were left on an undivided basis with Panhandle Eastern, arrangements would be made for storing gas in the Austin and other fields

during off-peak periods in order that it be available to meet the peak demands of the space-heating season, and (2) that Panhandle Eastern would continue to allot to the Michigan Consolidated market the same percentage of its total daily capacity as it allotted in 1946 and has offered to allot on completion of its "Group A and B" facilities.

Both of these assumptions, despite the majority's concern lest they may not be in in accord with Panhandle Eastern's intentions, are grounded in the record of the consolidated proceedings. Thus, in a letter of August 16, 1946, which constitutes Exhibit No. 496 in Docket No. G-706, Chairman Maguire of Panhandle Eastern formally tendered Michigan Consolidated a 10 to 15 year contract for delivery at Detroit, on completion of the "Group B" facilities, of a total of 152,500 mcf. of gas per day on a firm basis. This tender was explicitly on the assumption that the delivery schedule be fixed, under the regulatory authority of the Federal Power Commission, "to the end of providing for the storage by you of excess and summer gas that it may be available for the service of Detroit consumers during winter months."

This is precisely the assumption on the basis of which my figures were compiled from the record. But the majority have also raised the question whether, due to commitments to the Michigan Gas Storage Company and the Union Gas Company of Canada, Panhandle Eastern could make good such an offer of 152,500 mcf. per day throughout the year to Michigan Consolidated's Detroit market after completion of the "Group B" facilities. They are probably basing their conclusions on Exhibit No. 298, which shows 42,350,000 mcf. as the total annual deliveries to the Detroit area in 1948 out of a total annual design sales capacity of 168,064,000 mcf. after completion of the "Group B" facilities. In doing so they have overlooked important supplementary facts which are also a matter of record.

In the first place, the Exhibit itself shows 4,765,000 mcf. of surplus gas in 1948 which would be available to the Detroit market if required by Michigan Consolidated. In the [fol. 561] second place, the Exhibit does not take account of the spare compressor units, given emergency authorization by this Commission on October 25, 1946, which will permit 100 per cent utilization of the theoretical line capacity of 473,000 mcf. per day throughout the year, thereby increas-

ing deliveries in the off-peak months April to October by a total of 4,581,000 mcf.[2] In the third place, the record shows that the cleaning of the pipe lines, already half completed, will raise their theoretical daily capacity on completion of the "Group B" facilities from 473,000 mcf. to not less than 493,000 mcf. (T. 10496) This increase of 20,000 mcf. per day means a further increase of about 7,300,000 mcf. in the annual total. In the fourth place, the record shows that the 473,000 mcf. per day theoretical design capacity, after the installation of the "Group B" facilities, assumes no overloading of compressor stations. The record shows that Panhandle Eastern operated some of its compressor stations at overloads in excess of 25 per cent throughout the entire last winter period even though no spare or standby compressor units were then available at such stations. Operation of such compressor stations at 10 per cent overloads will make available an additional 7,300,000 mcf. annually. (T. 10552; Exhibit 303)

The combination of these factors will make it possible for Panhandle Eastern to meet all the commitments to Michigan Gas Storage, Union of Canada and its other customers shown in Exhibit 298, and to supply the 56,400,000 mcf indicated on page 12 of my previous opinion as available to meet Michigan Consolidated's requirements, with some 9,896,000 mcf. a year to spare. To make this perfectly clear I attach, as Appendix A, a summary compilation of data from the record.

In this connection it may be noted, in passing, that the majority's effort to bolster its position by reference to Panhandle Eastern's commitments to Union Gas Company of Canada is hardly in line with the facts. They have apparently forgotten that the Commission's authorization for the export of this gas contains a provision permitting such export only when Panhandle Eastern's customers in the [fol. 562] United States would not thereby be deprived of gas to meet their requirements. According to Exhibit 298 this would make additional amounts of gas up to 5,500,000 annually available if required.

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[2] This is the amount by which the design sales capacity shown in Exhibit 298 is less than 365 times 473,000 due to allowance made in the exhibit for shutting down compressor units in off-peak months for maintenance.

In very simple terms, we know from the testimony of President Fink of Michigan Consolidated that his company expects to take at least 45,000,000 mcf. a year from Panhandle Eastern in 1949 and 1950. We know from the record that this compares with 38,000,000 mcf. taken from Panhandle in 1946 and with an average of 32,000,000 mcf. taken in the majority's so-called "pattern of service" years 1942-1945. We know from Michigan-Wisconsin's own testimony that they estimate the firm requirements of the Detroit and Ann Arbor markets in 1952 at only 44,818,000 mcf.[3] We know from the record that, with a sound storage program, such as Panhandle Eastern has worked out with Consumers Power, the firm requirements of Michigan Consolidated in Detroit and Ann Arbor in 1952 could thus be taken care of. And we know from the record that these estimated requirements include 10,000,000 mcf. of industrial load.[3]

We know further, from facts in the record, that Panhandle Eastern has plans by successive stages to raise its theoretical capacity from a present 393,000 mcf. per day to 725,000 mcf. per day.[4] We know that the company has been handicapped in planning for the Detroit market by war controls and by the uncertainty as to its tenure of the market in the face of holding company plans which have now received the accolade of the majority of this Commission. We know that Panhandle Eastern has characteristically allotted Michigan Consolidated at least 33 per cent of its capacity. And we know also, by simple arithmetic, that 33 per cent of 725,000 is approximately 239,000 mcf. and that 365 × 239,000 produces 87,200,000 mcf. in round figures.[5]

As indicated in my previous opinion, this would provide enough gas to take care of Michigan Consolidated's entire [fol. 563] 1952 firm requirements, including its Western Districts, and, in addition, to provide for 30,000,000 mcf. of interruptible industrial sales.

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[3] See Appendix B.

[4] Panhandle Eastern, on March 5, 1947, filed application for a certificate for its "Group C" facilities to increase its capacity to 580,000 mcf. per day from its presently authorized capacity of 473,000 mcf. per day.

[5] See Appendix B.

We know also that the certificate powers of the Commission are broad enough to assure that an adequate proportion of Panhandle's capacity, on completion of the "Groups C and D" facilities go to Michigan Consolidated's Detroit and other markets, if use of such authority should be required. But the record shows that Panhandle Eastern itself, in connection with its expansion plans, is thinking in terms of a proportionate increase in supply of gas to the Michigan Consolidated Detroit market.

This appears at the conclusion of a series of questions directed at Mr. Burnham, Vice President of Panhandle Eastern, by Mr. Lee representing the City of Detroit. Mr. Lee was questioning Mr. Burnham in regard to what additional supplies of gas the city might expect from the completion of the "Group C" and "Group D" facilities. The final question, asked by the Trial Examiner, drew an unequivocal answer as follows:

Trial Examiner: Mr. Burnham, could you answer this way: Assuming that your present happy relationship continues to exist toward the Detroit area, would it be your opinion that increasing the capacity of your line would result in a comparable increase in your service to Detroit?

Mr. Burnham: Certainly. (T. 5772)

In order that there may be no further question as to the manner in which the figures in my previous opinion were derived from the record, I attach, as Appendix B, an annotated analysis of the sources of these data. These facts, coupled with the preceding substantiation of my assumptions, should afford adequate basis for judging whether the statements on pages 10, 11, 12 and 13 of my previous opinion are "conjectural and misleading" as alleged by the majority, or whether they are founded on facts from the record which the majority prefer to ignore.

Record Reveals Pressure to Force Panhandle to Sign Own Warrant

[fol. 564] The whole tenor of the majority's supplemental opinion suggests that they might as well have decided the measure of Panhandle Eastern's rights on November 30, except for the possibility that the company would save them the necessity by accepting Michigan Consolidated's offer. The majority has questioned whether the record supports the statement in my previous dissent concerning use of the

January 15 hearing to bring pressure on Panhandle to accept a tendered contract as a measure of its rights. Well, let us look at the record.

Michigan-Wisconsin originally proposed to take the entire Michigan Consolidated, Detroit and Ann Arbor markets away from Panhandle Eastern at the termination of its contract on December 31, 1951. Later, when it appeared that some recognition must be given to Panhandle Eastern's rights, President Fink of Michigan Consolidated testified that the prospective market for interruptible industrial gas in the Detroit area had increased to 43,500,000 mcf. a year, or 32,000,000 mcf. more than Michigan-Wisconsin would be able to supply in 1952. He would, therefore, be willing to contract, for say 15 years, to purchase 32,000,000 mcf. per year from Panhandle Eastern at substantially 100 per cent load factor. (T. 14288-14294)

There followed a significant sequence of events showing efforts to get Panhandle Eastern to accept this offer as a measure of its rights in a market which it is serving under "grandfather" and other certificates. These events were: November 30, the Commission majority conditioned its certificate to Michigan-Wisconsin on operation of the new line with due regard to Panhandle Eastern's right and duties, but postponed determination of these to a supplemental order to be issued within 15 days. December 10, Michigan-Wisconsin sent Panhandle Eastern a proposed contract, based upon Mr. Fink's offer, as a possible basis for the Commission's supplemental order, such offer to hold open until December 21. A copy of this proposed contract, with covering letter, was sent to the Commission with a request that the time for the supplemental order be extended. December 12, Panhandle Eastern replied that the Commission's determination was the next order of business, sending a copy of its letter to the Commission. December 14, the [fol. 565] Commission majority, by order, extended the period for the supplemental order to December 30. December 27, an inconclusive conference between the two companies was held at the office of Counsel for Michigan-Wisconsin. December 30 and January 3, the Commission majority set a hearing for January 15 in the limited matter of Panhandle Eastern's rights.

Throughout the supplemental proceedings it was made to appear that Panhandle Eastern had not made clear its con-

ception of the measure of its rights. This was coupled with an attempt to get Panhandle Eastern to take a final position on the Michigan Consolidated offer prior to the Commission's determination of these rights. This was apparently a consequence of the unreadiness of the majority to make the major finding as to Panhandle Eastern's rights, required to complete its original November 30 decision. This, in turn, was apparently due to their inability to make up their mind on the basic legal issue.

Thus, early in the January 15 hearing, Assistant General Counsel McGee of the Commission Staff outlined the Staff's conception of the purpose of the proceeding in part as follows:

"It is the position of the staff that * * * it is the obligation of the applicant and Panhandle Eastern Pipe Line Company, in particular, * * * to present to the Commission witnesses who will testify with respect to the intentions of Panhandle Eastern to render service in the Detroit area, its views regarding its obligations to render such service, and whether or not that company and Michigan Consolidated Gas Company and Michigan-Wisconsin Pipe Line Company have had any negotiations looking toward the rendition of service in that community during the term of the present contract and beyond that term." (T. 16840-41)

After referring to the previous testimony of the President of Michigan Consolidated, that his company would be willing to contract for 32 million mcf. per year after the conclusion of the existing contract, Mr. McGee continued:

"The record at the present time, of course, does not indicate whether Panhandle Eastern Pipe Line Company believes that such an offer is in keeping with its pattern of [fol. 566] service presently being rendered and proposed to be rendered by it to the Michigan Consolidated Gas Company." (T. 16841)

Now, I recognize that Commission Counsel was in difficulty attempting to function under a highly ambiguous and unnecessary order. But it seems to me that the above statement was in fact simply calling upon Panhandle to make the Commission's decision for it or accept the consequences. Just how the company could be expected, before the Commission's pronouncement on the basic issue of certificate rights,

to testify as to whether the Michigan Consolidated offer was "in keeping with its pattern of service (whatever that is) * * * proposed to be rendered by it to Michigan Consolidated Gas Company" is beyond my poor comprehension. Mr. McGee gave the impression of begging Panhandle Eastern to give up its consistently held legal position.

Panhandle Eastern's Counsel Letts very properly replied:

"May I remind members of the Commission and the Examiner that there are pages and pages of testimony in this record wherein Panhandle Eastern said that it was financially able, that it intended to, was willing to and would, if permitted, serve the entire Detroit market. * * *" (T. 16846)

"Given permission to build the facilities we will guarantee that we will put gas into the City of Detroit to supplement the load there more quickly than any applicant before this Commission today." (Tr. 16846)

Contrary to the majority's supplemental opinion, Panhandle Eastern did state very *explicitly* what it thought about the proposed approach to the determination of its "pattern of service." Mr. Lett said:

"We will be prepared before the close of this hearing to complete that job[6] and give the total overall delivery for the year 1946 but * * * the years that have been indicated by this order of the Commission as being years to portray a pattern of service to this market by Panhandle, with the exception of the year 1946, are what? Every one of them is a war year; every one of them a year when Panhandle [fol. 567] was not running its[7] business, every one a year where our gas was being delivered in the Appalachian region and other regions, by the exercise of the war power of the United States government, over which we had no control * * * so we cannot adduce evidence for that or go along with the theory or interpretation that there is here to be woven a pattern indicating the scope of the rights of Panhandle Eastern in this market. * * *" (T. 16849)

Similarly, counsel for Panhandle Eastern made it clear that they could not accept the proposition that the pattern

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[6] The job of supplying of information as to deliveries to Michigan Consolidated.

[7] Record shows obvious misprint "in" for "its."

of service at the time of issuance of their certificates was "any norm or standard or measurement of Panhandle Eastern's rights in this market". They contended that on the contrary "it is only after those certificates have been acted upon, the facilities financed, built and utilized to their full capacity, that we then * * * begin to have some conception of a realistic pattern as to the extent of the service there."[8] Mr. Letts continued:

"We also firmly take the position that Panhandle Eastern, beyond the scope of the full exercise of the capacity of the facilities for which certificates have been issued, is entitled as a matter of sound public policy in utility regulation and of law, to the first opportunity to supply the expanding needs of an expanding market." (T. 16850)

Thus, contrary to the suggestion in the majority supplemental opinion, Panhandle Eastern gave a full and unequivocal answer to the issue purported to be posed by the December 30, 1946, order setting the supplemental hearing. What, then, was Commission Counsel seeking further? The answer becomes clear as we follow the record of the effort of Commission Counsel and Counsel for Michigan-Wisconsin to develop in the record Panhandle Eastern's attitude in a conference of December 27, 1946, between the two companies in which the Michigan Consolidated offer was discussed. Counsel for Panhandle Eastern characterized this as a [fol. 568] "back-handed way of showing something that you cannot prove affirmatively and we submit the testimony is entirely inadmissible." (T. 16963)

The Trial Examiner sustained an objection to this line of testimony, but Commission Counsel confinued his efforts along this line until the Examiner stated:

"I think the record also very clearly shows that Counsel of the Commission's Staff, *in spite of the Examiner's ruling,* is determined to put in this record, everything possible con-

[8] The majority cannot get away from the fact that, under certificates issued, Michigan Consolidated expects to take 45,000,000 mcf a year from Panhandle Eastern in 1949 and 1950, and has been offered the possibility of securing up to 56,000,000 mcf.

cerning that conference on December 27, and what consideration the Commission will be able to give to that testimony or to that attempt at this point I am not able to say." (T. 16982) (Emphasis supplied.)

The Trial Examiner made it perfectly clear, in connection with his ruling, that he did not believe Panhandle had to answer the question "why don't you accept" the proposition of Michigan Consolidated. (T. 16984) It is immediately following this statement of the Examiner that it becomes clear that the object of the hearing was to force Panhandle Eastern into either accepting or rejecting the offer.

Counsel for Michigan-Wisconsin stated he thought the position of Panhandle, with respect to the offer, to be very material to the proceeding. He contended that "by the very fact that they take no position, by the very fact that they do not advise this Commission as to whether or not this proposed contract is or is not acceptable to them—and if not acceptable, why it is not—they are, by remaining silent, taking a position for purposes of this hearing and for purposes of further orders of this Federal Power Commission." He added that "this situation comes down legally, in my judgment, to the position that Panhandle is in, of either 'speak now or forever hold your peace.'" (T. 16989-90)

There followed a colloquy between the Trial Examiner and counsel for both Michigan-Wisconsin and the Commission which is significant of the hearing atmosphere.

Trial Examiner: You feel that by offering the contract you can impose upon Panhandle a duty to respond, to come into a hearing and to speak or forever after hold your peace? [fol. 569] Mr. Shannon. Under the circumstances in this case, yes.

Trial Examiner: That is the point I want to clear now. That is your point?

Mr. Shannon: That is right.

Trial Examiner: And that in this hearing you are telling Panhandle, "we want your answer to this offer."

Mr. Shannon: If they have any answer they want to submit to this Commission, now is their chance and they are on notice that this is their opportunity. (T. 16990)

Apparently counsel for Michigan-Wisconsin thought he had a rather clear notion as to the purpose of the hearing.

The Examiner then turned to Commission Counsel to confirm his view. The record proceeds as follows:

Trial Examiner: Now, Mr. McGee, do you take the same position as Mr. Shannon takes as to the duty now upon Panhandle to answer to this proposal?

Mr. McGee (Commission Counsel): I think I have already taken that position.

Trial Examiner: That is your position?

Mr. McGee: Yes. (T. 16991)

The Examiner then called upon Mr. Culton, Counsel for Panhandle Eastern, who made it perfectly clear that they did not intend to be put on the spot in such manner and that their position was unequivocal. He said:

"I wish to observe that we have already shown what Panhandle contends. . . . Panhandle contends that by virtue of the Natural Gas Act, by virtue of the fundamental principles of regulation and by virtue of certain certificates that have been delivered to Panhandle, that Panhandle's rights, duties and obligations relate to the entire Detroit and Ann Arbor markets. We have made that contention, if counsel perhaps didn't know it, several times before the Commission. We renew it now . . . and until the Commission has given Panhandle instructions as to how much additional gas it shall deliver, and until the Commission shall have authorized Panhandle to construct such additional facilities [fol. 570] as are required to deliver that additional gas and Panhandle shall fail to do so, there is no principle which will justify the taking away from Panhandle of any of its rights." (T. 16992)

Counsel for Michigan-Wisconsin topped off the argument with the following revealing statement:

Mr. Shannon (in part) "I think I have also made very clear our position with respect to Panhandle's so-called rights. I think this record is very clear Panhandle has been put on notice, complete, that now is the time for them to talk and they have chosen, or their eminent counsel have chosen for reasons best known to themselves, to stand mute, so that from our standpoint, the record speaks for itself. We have shown what we were willing to do, and Panhandle has refused our offer." (T. 17032)

Now, this statement reveals a significant legal fallacy. In the first place, although in their initial order of November 30, 1946, the majority recognized that Panhandle Eastern did have some rights which must be recognized, Mr. Shannon always refers to them as "so-called" rights. In the second place, he treats the share of the market to which Panhandle Eastern may be entitled as dependent upon the will of Michigan Consolidated rather than upon the authority of the Commission.

The full significance of this point of view becomes clear when we turn back to Mr. Shannon's opening statement in the January 15-16 hearing. He said:

"We have had considerable contention here with respect to Panhandle's so-called rights. Now, as I see the law when Panhandle's contracts with the distributing company . . . expire, Panhandle still has its certificate from the Federal Power Commission with authority to go out and operate its facilities, but that certificate does not give it any business, that certificate does not give it a continuation of a purchase contract, either existing or a new one. It is merely permission from the Federal Power Commission to do something which the statute prohibits unless that permission is obtained, so that Panhandle, along with other companies, has a job of going out and getting business and retaining that business." (T. 16910)

[fol. 571] For the Commission to take this view of the legal position of a natural gas company operating under its certificates would do violence to all the equities by leaving duties and rights wholly out of balance. The company cannot operate without obtaining a certificate. It cannot expand its capacity without obtaining a certificate. It cannot take on a new customer without obtaining a certificate. Even on expiration of its contract with the distributing company, it cannot abandon service without the consent of the Commission based on a showing that its services are no longer required. And yet, with perhaps millions invested in serving a particular distribution area, it can be told when its contract expires "yes, you have a certificate to operate, but your market is whatever a newly authorized competitor, through its affiliated distributing company, is ready to allow you."

This gives an idea of the nature of the record on which the majority's supplemental decision purports to be based. Its nature may explain the confused reasoning of the supplemental opinion. In view of the fact that a given market cannot be supplied with gas by an alternative supplier without the grant of a certificate by the Commission, where there is affiliation between the contracting distribution company and the intruding pipe line company, the Commission makes itself a decisive ally of the newcomer when it grants a certificate, except upon clear showing of the inability or unwillingness of the existing company to meet the reasonable requirements of the market. I assert categorically that no such showing has been made against Panhandle Eastern in the present case.

Just What Has Majority Decided?

It is thus clear that the significant new evidence from the January 15-16 hearing, which apparently enabled the majority to reach a conclusion as to the measure of Panhandle's rights in the Michigan-Wisconsin market, consisted of (1) the placing in the record of what Michigan Consolidated was willing to offer Panhandle as a means of obtaining a favorable decision from the Commission, and (2) the refusal of Panhandle Eastern to relieve the majority of the necessity of making a decision on an issue which was a key to the soundness of the November 30, 1946, decision to issue a certificate to the Michigan-Wisconsin Pipe Line Company.

[fol. 572] But what was the conclusion of the majority on this essential issue? I confess that the supplemental opinion leaves me in some confusion in the matter. Up to a point I understand that they have given their blessing to the proposed contract which Michigan Consolidated (alter ego for Michigan-Wisconsin) has offered Panhandle Eastern for the 15 years succeeding termination of the present contract. That is, they have accepted the applicant's theory that rights to a market are related more to a private contract than to a Commission certificate. But what they intend to accord Panhandle Eastern in the way of participation in the growth of the market beyond "the volumes then being contractually purchased * * * from Panhandle and Michigan-Wisconsin," certainly requires further clarification.

The majority has rationalized their conclusions in pages 21 to 28 of their supplemental opinion. They begin on page

21 by misrepresenting my previous reflections on the effect of their decision on the financial risk of the industry by applying them only to Panhandle Eastern. By doing so they avoid the necessity of squaring their opinion with that taken by the Commission and the courts in numerous rate cases. They continue with the rather unusual concept that "a certain continuity of service should be preserved if possible" and proceed to assert that "there is no intention • • • to modify, terminate or set aside any certificate heretofore issued by the Commission to Panhandle."

This hardly squares with the majority's conclusion that Michigan Consolidated's offer of a 15 year contract for 32,000,000 mcf. a year of gas from Panhandle "may be considered as a bona fide desire on the part of Michigan Consolidated to furnish a manner of protection to *whatever rights* Panhandle might have in rendering service to Michigan Consolidated" (emphasis supplied) and its findings that on this basis "there is available to Panhandle an opportunity to continue to make deliveries of gas to Michigan Consolidated after December 31, 1951, on terms and conditions not only substantially similar to those now in effect but in many respects more favorable to Panhandle." Aside from the unfortunate use of the phrase "whatever rights," which too closely parallels Mr. Shannon's phrase "so-called rights," this finding has serious defects. For, despite the [fol. 573] numerous further findings to the effect that Panhandle's "pattern of service" under various certificates will be unaffected, this is not the case.

Thus the 90,000 mcf. a day which it assumes throughout the year represents only 70 per cent of the peak capacity which Panhandle had dedicated to this service under earlier certificates and which is recognized as representing its present responsibility to the Michigan Consolidated market. Moreover it represents less than 60 per cent of the capacity which Panhandle offered to provide for the Michigan Consolidated market following completion of the presently certificated "Group B" facilities.

There is much vague language in the majority supplemental opinion such as that "the continuance of gas service to Michigan Consolidated should be in keeping with Panhandle's ability to render adequately such further service in the best manner possible" and that in "considering the rights of Panhandle in this matter we have at all time at-

tempted to recognize among other things that managerial discretion plays an important role in the operation of a large pipe line system." But the sum and substance of it all is that the majority have in effect recognized the right of a potential competitor for one of Panhandle's major markets, a creature of the distributing company serving that market, to define the rights of Panhandle Eastern under "grandfather" and other certificates issued by this Commission under a law enacted by Congress.

I think this is unsound in terms of the basic principles of regulation. I think the supplemental opinion represents a lot of second guessing to support the weak opinion originally issued and a congeries of novel attempts to answer the previously issued dissenting opinions. The opinion, it seems to me, may best be characterized from a phrase frequently used therein, namely, "pattern of service." In my opinion this phrase covers an ambiguous attempt to create an impression of substance out of airy nothing.

I stand on my original dissenting opinion. No sound reasons have been shown for authorizing a new pipe line company to invade markets which Panhandle Eastern developed and is able and willing to serve, if afforded an opportunity. [fol. 574] No sound explanation has been given why the supplying of these markets should not be recognized as the responsibility and right of Panhandle Eastern under the series of certificates issued by the Commission.

Leland Olds, Commissioner.

March 20, 1947.

Date of issuance: March 21, 1947.

Appendix A

Panhandle Eastern's Ability to Deliver 56,400,000 Mcf. of Gas Annually to Michigan Consolidated on Completion of Group B Facilities

	Annual Volume, Mcf.
Deliveries to Michigan Consolidated Gas Company at Detroit in 1948 (Exh. 298)	42,350,000
Surplus volumes available in 1948 (Exh. 298)	4,765,000[1]
Additional volumes resulting from installation of spare compressor units authorized in Docket No. G-784	4,581,000
Additional volumes resulting from pipe cleaning operation (Tr. 10496)	7,300,000
Additional volumes resulting from operation of compressor station at 10% overloads (Tr. 10552; Exh. 303)	7,300,000
Total volume available in excess of indicated deliveries to customers other than Michigan Consolidated Gas Company	66,296,000
Annual requirements for delivery to Michigan Consolidated Gas Company of 154,500 mcf. daily at 100% load factor	56,400,000
Excess available for other customers	9,896,000[2]

[1] The 4,765,000 mcf shown in Exhibit 298 as Surplus reflects annual deliveries among others, of 5,500,000 mcf to Union Gas Company of Canada, Inc., and 9,150,000 mcf to the Ohio Fuel Gas Company. The latter delivery represents Panhandle Eastern's minimum obligation under a new contract between the companies, reducing Panhandle Eastern's minimum obligation under an existing contract by 50 percent, or 9,150,000 mcf annually. The new contract is presently under suspension by the Commission.

[2] The excess of 9,896,000 mcf would be more than sufficient to meet the additional requirements of Ohio Fuel Gas Company under the presently effective contract referred to in footnote [1] above.

[fol. 575]

Appendix B

Annotated Record of Figures used by Commissioner Olds in his Dissenting Opinion of February 7, 1947, in Docket No. G-669

The data analyzed below are taken from pages 10 to 14, inclusive, of my original dissenting opinion of February 7, 1947, concerning which the majority said on page 12 of their supplemental opinion: "We believe that if any confusion exists it is not because of the majority action, but rather, it is due to the conjectural and misleading statements contained in pages 10, 11, 12 and 13 of his (Commissioner Olds') dissent, which have no basis in fact but rest on assumption only." In the main body of this supplementary dissent I have shown that the record contains solid foundations for my assumptions. Here I show, page by page, that my statements have substantial basis in facts. The references are to exhibits and transcript pages which are parts of the formal record in this case.

Figures From Page 10

Item No.

1. 127,000 mcf — Detroit 125,000 mcf per day (Exh. 252)
   Ann Arbor 2,000 " " " (" 269)
   127,000 mcf per day
2. 33% — $\frac{127{,}000}{383{,}000}$ mcf $\times$ 100% = 33.2%
3. 383,000 mcf (Exh. 300, p. 2)

[fol. 576]

Figures From Page 11

Item No.

4. 154,500 mcf per day — Detroit 152,500 mcf per day (Exh. 496)
Ann Arbor 2,000 " " " (" 269)
154,500 mcf per day

5. 33% $\frac{154,500}{473,000}$ mcf × 100% = 32.7%

6. 473,000 mcf (Exh. 300, p. 4)

7. 239,000 mcf 0.33 × 725,000 = 239,250 mcf

8. 725,000 mcf (Exh. 300, p. 8)

9. 127,000 mcf (See Item # 1)

10. 46,400,000 mcf 127,000 (Item # 1) × 365 days = 46,355,000 mcf

11. 44,818,000 mcf Detroit 1952 (Exh. 224, p. 14, l. 19) 43,882,0
Ann Arbor 1952 (Exh. 224, p. 48, l. 17) 936,3
44,818,3

[fol. 577]

Item No.

12. 2,300,000 mcf (See Exh. 224 for all towns except Detroit)

Detroit (Tr. 8097)
Ann Arbor (p. 48, l. 17)
Grand Rapids (p. 35, l. 18)
Muskegon (p. 62, l. 18)
Mt. Pleasant (p. 73, l. 17)
Big Rapids (p. 80, l. 17)
Greenville-Belding (p. 88, l. 17)

48,701,100 − 46,400,000 (Item # 10) = 2,301,100 mcf

Figures From Page 12

13. 10,000,000 mcf Industrial Gas
Exh. 224
Detroit (p. 14, l. 10)
Ann Arbor (p. 48, l. 8)
Grand Rapids (p. 35, l. 9)
Muskegon (p. 62, l. 9)
Mt. Pleasant (p. 73, l. 8)
Big Rapids (p. 80, l. 8)
Greenville-Belding (p. 88, l. 8)

1948	1949
34,663,400 mcf	37,713,400 mcf
646,900	719,300
5,575,500	6,274,500
2,308,800	2,528,400
637,200	661,100
449,200	463,400
303,100	341,000
44,584,100 mcf	48,701,100 mcf

1948	1949
8,432,000 mcf	8,831,000 mcf
62,000	62,000
723,000	772,000
514,300	514,300
18,000	18,000
41,700	41,700
90,000	90,000
9,881,000 mcf	10,329,000 mcf

[fol. 578]

Item No

14. 45,625,000 mcf 125,000 (Exh. 252) × 365 days = 45,625,000 mcf
15. 26,315,000 mcf (Exh. 224, p. 14, l. 20) Year 1942
16. 31,278,000 mcf (" " " " " ") Year 1943
17. 31,250,000 mcf (Exh. 224, p. 14, l. 20) Year 1944
18. 32,089,000 mcf (" " " " " ") Year 1945
19. 88,500,000 mcf (Tr. 16912).
20. 1946-47 winter deliveries to Ann Arbor — 4,273 mcf (Tr. 16914)
21. 56,400,000 mcf 154,500 (Item # 4) × 365 days = 56,392,500 mcf

Figures From Page 13

22. 11,000,000 to 12,000,000 mcf, Industrial Gas

	Exh. 224	1951	1952
Detroit	(p. 14, l. 10)	9,644,000 mcf	10,047,000 mcf
Grand Rapids	(p. 35, l. 9)	870,000	919,000
Ann Arbor	(p. 48, l. 8)	62,000	62,000
Muskegon	(p. 62, l. 9)	514,300	514,300
Mt. Pleasant	(p. 73, l. 8)	18,000	18,000
Big Rapids	(p. 80, l. 8)	41,700	41,700
Greenville-Belding	(p. 88, l. 8)	90,000	90,000
		11,240,000 mcf	11,692,000 mcf

[fol. 579]

Item No.

23. 54,700,000 mcf and 57,300,000 mcf
(See Exh. 224 except for Detroit)

		1951	1952
Detroit	(Tr. 8098)	42,085,400 mcf	43,882,000 mcf
Grand Rapids	(p. 35, l. 18)	7,323,300	7,843,700
Ann Arbor	(p. 48, l. 17)	868,000	936,300
Muskegon	(p. 62, l. 18)	2,843,900	3,009,000
Mt. Pleasant	(p. 73, l. 17)	696,700	714,400
Big Rapids	(p. 80, l. 17)	465,700	466,900
Greenville-Belding	(p. 88, l. 17)	390,100	410,400
		54,673,100 mcf	57,262,700 mcf

24. 239,000 mcf (See Item #7)
25. 87,200,000 mcf 239,000 (Item #7) × 365 days = 87,235,000 mcf
26. 30,000,000 mcf

Item #25	87,200,000 mcf
Item #23 — 1952	57,300,000
	29,900,000 mcf

27. 11,692,000 mcf (Item #22) — 1952)
28. 32,000,000 mcf (Tr. 14291)
29. 87,200,000 mcf (Item #25)

[fol. 580]

Figures From Page 14

Item No.

30. 32,000,000 mcf (Item # 23)

31. 6,000,000 mcf

38,500,000 (Item # 19) — 32,000,000 (Item # 28) = 6,500,000 mcf

32. 13,000,000 mcf 45,625,000 (Item # 14) — 32,000,000 = 13,625,000 mcf

33. 24,000,000 mcf 56,400,000 (Item # 21) — 32,000,000 = 24,400,000 mcf

34. 55,000,000 mcf

Detroit (Tr. 8098) Firm		43,882,000 mcf
(Tr. 14290) Interruptible		43,500,000
Detroit Requirements — 1952		87,382,000 mcf
Detroit Requirements — 1945	(Item # 18)	32,089,000
		55,293,000 mcf

35. 44,000,000 mcf

Detroit Industrial (Exh. 224, p. 14, l. 10)	1952	10,047,000 mcf
(Tr. 14290)		43,500,000
Total Industrial — 1952		53,547,000 mcf
Detroit Industrial (Exh. 224, p. 14, l. 10)	1945	6,964,200 mcf
(Exh. 224, p. 14, l. 16)	1945	2,396,000
Total Industrial — 1945		9,360,200 mcf

[fol. 581]

Item No.

	Increase — 1952 over 1945 — Industrial			44,186,800 mcf
36.	62,000,000 mcf	Item 23 — 1952 — Firm	57,262,700 mcf	
		Tr. 14290 — Detroit	43,500,000	
		Tr. 14290 — Muskegon	1,500,000	
			102,262,700 mcf	

1945 Requirements

Exh. 224		Industrial		Total
Detroit	(p. 14, l. 10, 16)	9,360,200 mcf	(l. 19)	32,457,400 mcf
Grand Rapids	(" 35 " 9)	600,000	(" 18)	4,149,200
Ann Arbor	(" 48 " 8)	62,000	(" 17)	449,800
Muskegon	(" 62 " 9)	600,000	(" 18)	1,994,700
Mt. Pleasant	(" 73 " 8)	15,900	(" 17)	548,200
Big Rapids	(" 80 " 8)	43,000	(" 17)	378,400
Greenville-Belding	(" 80 " 8)	50,000	(" 17)	151,600
		10,731,100 mcf		40,129,300 mcf

102,262,000 mcf — 40,129,300 mcf = 62,132,700 mcf

37. 46,000,000 mcf

[fol. 582]

Item No.

Firm Industrial Gas — 1952 (Item #22)
Detroit Additional Ind. — 1952 (Tr. 14290)
Muskegon Additional Ind. — 1952 (Tr. 14290)

Total Industrial — 1952
1945 Industrial (Item #36)

Difference

38. 11,000,000 mcf (Item #36) — 1945 Industrial
39. 57,000,000 mcf (See Item #37) — 1952 Industrial

11,692,000 mcf
43,500,000
1,500,000

56,692,000 mcf
10,731,100

45,960,900 mcf
10,731,100 mcf
56,692,000 mcf

[fol. 583] Plaintiff's Exhibit 25 is an order of the Federal Power Commission, dated March 20, 1947, in Docket No. G-834 (application of Austin Field Pipe Line Company, plaintiff's Exhibit 14) and Docket No. G-839 (application of Michigan Consolidated Gas Company for a certificate, plaintiff's Exhibit 17) consolidates the proceedings therein for the purpose of hearing and fixes the date of a hearing in said matters to be held on April 14, 1947 at 10 o'clock A. M.

PLAINTIFF'S EXHIBIT 26

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

Before Commissioners: Nelson Lee Smith, Chairman; Claude L. Draper, Leland Olds and Harrington Wimberly

May 6, 1947.

Docket No. G-669

IN THE MATTER OF MICHIGAN-WISCONSIN PIPE LINE COMPANY

ORDER MODIFYING OPINION NO. 147 AND ORDER IN RELATION THERETO OF NOVEMBER 30 AND SUPPLEMENTAL ORDER IN CONNECTION THEREWITH OF DECEMBER 30, 1946

Upon further consideration of the Commission's order of November 30, 1946, issuing a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, authorizing the Michigan-Wisconsin Pipe Line Company to construct and operate certain transmission gas pipeline facilities, Opinion No. 147 and supplemental order of December 30, 1946;

The commission finds that:

It is in the public interest that its order of November 30, 1946, issuing a certificate of public convenience and necessity in this matter to Michigan-Wisconsin Pipe Line Company, its Opinion No. 147 and its supplemental order of December 30, 1946, be modified as hereinafter ordered.

The Commission orders that:

The certificate of public convenience and necessity issued to the Michigan-Wisconsin Pipe Line Company by the

Commission's order of November 30, 1946, its opinion in [fol. 584] relation thereto, and supplemental order of December 30, 1946, be and the same are hereby modified and revised as follows:

(1) By changing the phrase "77,700 horsepower" appearing at page 33 of Opinion No. 147 with respect to horsepower to be added at the Hugoton Compressor Station at the end of the fifth year, to read "1,700 horsepower."

(2) By substituting the following sentence for the first sentence of the last paragraph appearing on page 34 of Opinion No. 147:

"The cost estimates contain substantial allowance for contingencies and overheads (13.9% for initial construction and 10.4% for subsequent construction)."

(3) By deleting the word "firm" appearing at page 36 of Opinion No. 147, in the last sentence of the first paragraph.

(4) By revising paragraph (B) (vii) of its order of November 30, 1946, to read as follows:

"The facilities herein authorized shall not be used for the transportation or sale of natural gas subject to the jurisdiction of the Commission until Applicant submits to this Commission a schedule of rates and charges in a form satisfactory to this Commission providing for adequate and reasonable rates and charges consistent with the public interest."

(5) By substituting the following phrase for that which precedes the tabulation in paragraph (h), page 4, of the Commission's supplemental order of December 30, 1946:

"The following tabulation illustrates the sales requirements on the Panhandle Eastern system on a zero-degree day:"

By the Commission. Commissioner Draper dissenting. Commissioner Olds not participating.

Leon M. Fuquay, Secretary.

Date of Issuance: May 8, 1947.

[fol. 585] PLAINTIFF'S EXHIBIT 27

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

Before Commissioners Nelson Lee Smith, Chairman; Claude L. Draper, Leland Olds, and Harrington Wimberly

August 1, 1947.

Docket No. G-834. Docket Nos. G-839 and G-918

In the Matters of AUSTIN FIELD PIPE LINE COMPANY and MICHIGAN CONSOLIDATED GAS COMPANY

ORDER CONSOLIDATING PROCEEDINGS AND FIXING DATE OF HEARING

Upon consideration of the application filed on June 27, 1947, at Docket No. G-918, by Michigan Consolidated Gas Company (Michigan Consolidated), a Michigan corporation having its principal place of business at Detroit, Michigan, for a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, authorizing the construction and operation of certain natural-gas facilities, and the operation of other such facilities, or, in the alternative, a finding by the Commission that such construction and operation are not subject to the requirements of said Section 7 of the Natural Gas Act, as amended, all as more fully described in such application on file with the Commission and open to public inspection, public notice thereof having been given, including publication in the Federal Register on July 19, 1947 (12 FR 4834); and

It appearing to the Commission that:

(a) Pursuant to the Commission's order of March 20, 1947, hearings were held on April 14 to 23, 1947, inclusive, upon the applications filed by Austin Field Pipe Line Company (Austin Company) at Docket No. G-834 and Michigan Consolidated at Docket No. G-839, the proceedings upon which had been consolidated for the purpose of hearing.

(b) On May 1, 1947, Panhandle Eastern Pipe Line Company (Panhandle Eastern), an intervenor, acting pursuant to the provisions of Rule 28 of the Commission's Rules of Practice and Procedure (effective September 11, 1946) [18 CFR 1.28], including prior notice of its intention so to do, [fol. 586] filed a motion to reverse certain rulings of the Trial Examiner made in course of the above-mentioned hearings at Docket Nos. G-834 and G-839.

(c) It is in the public interest that further hearings be held with respect to the applications filed at Docket Nos. G-834 and G-839 for the reception of evidence as to the effect thereon of the construction and operations proposed by Michigan Consolidated at Docket No. G-918.

(d) Good cause exists for consolidating the further proceedings to be had at Docket Nos. G-834 and G-839 with proceedings at Docket No. G-918 for the purpose of hearing.

The Commission, therefore, orders that:

(A) Further proceedings be held with respect to the applications filed at Docket Nos. G-834 and G-839, limited to the reception of evidence as to the effect thereon of the construction and operations proposed by Michigan Consolidated Gas Company at Docket No. G-918 and the ultimate usefulness of the proposed facilities, including the Austin Field line, should circumstances require, for the transportation and storage of gas which might be obtained from the Panhandle Eastern Pipe Line Company.

(B) Such further proceedings at Docket Nos. G-834 and G-839 be and the same are hereby consolidated with the proceedings at Docket No. G-918 for the purpose of hearing.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by Sections 7 and 15 of the Natural Gas Act, as amended, and the Commission's Rules of Practice and Procedure (effective September 11, 1946), a hearing be held on the 13th day of effective August, 1947, at 10:00 a. m. (EDST) in the Hearing Room of the Federal Power Commission, 1800 Pennsylvania Avenue, N. W., Washington, D. C., concerning the matters involved and the issues presented by the applications and other pleadings in the above-entitled proceedings as limited by paragraph (A) above.

(D) Interested State commissions may participate as provided by Rules 8 and 37(f) [18 CFR 1.8 and 1.37(f)] of the Commission's Rules of Practice and Procedure.

[fol. 587] By the Commission.

Leon M. Fuquay, Secretary.

Date of Issuance: August 4, 1947.

NOTE RE PLAINTIFF'S EXHIBIT 28

Plaintiff's Exhibit 28 consists of two docket sheets, front and back sides, in Docket No. G-918. In lieu of printing the exhibit in full the following synopsis contained in, and the following excerpts from, said docket sheets are printed by stipulation of the parties:

Synopsis:

Application filed by Michigan Consolidated Gas Company, requesting a finding by the Commission that the matters involved therein are not subject to the requirements of Section 7(c) of the NGA, as amended, and that Applicant does not require the Commission's authorization therefor, or, in the alternative, the issuance of a certificate of public convenience and necessity pursuant to Sec. 7 of the NGA, as amended, authorizing Applicant:

(1) To operate, pending completion of the Michigan-Wisconsin Pipe Line Company project (G-669), the following facilities, which are to be constructed by Austin Field Pipe Line Co. pursuant to the latter's application for a cert., which application is pending before the Commission in G-834;

(a) A 26" O.D. Pipeline, approx. 140 mi. in length, extending southeasterly from a point at the Austin Storage Field to Southfield Township, Oakland County, Mich.;

(b) A metering station at Evergreen, the eastern terminus of the Austin-Detroit line;

(c) A gas compressor station on the Austin-Detroit line at the Austin Storage Field with an initial installation of 3,000 h. p.;

(2) To construct and operate a 26" O. D. pipeline connection to extend some 14½ mi. from eastern terminus of the above-described Austin-Detroit Line at Evergreen to Melvindale, Michigan;

(3) To continue the operation, pending completion of the [fol. 588] Michigan-Wisconsin project, of Applicant's Austin Storage Field insofar as such operation will involve the storage in and subsequent withdrawal from such field of gas which Applicant shall have obtained from Panhandle.

Applicant estimates the total overall capital cost of the

facilities which it proposes to construct to be $1,014.400, all of which amount Applicant proposes to finance by the use of treasury funds.

Hearings: August 13, 14, 15, 19, 1947, Washington, D. C.

* * * * * * * *

Excerpts:

June 27, 1947. Filed application requesting a finding that the matters involved are not subject to requirements of the Natural Gas Act, as amended, or, in the alternative, the issuance of a certificate of public convenience and necessity, together with Exhibits A, A-2, A-4, B, C (map) and E, and certificate of Stanley M. Morley, showing service thereof on the following on 6/27/47:

Michigan Public Service Commission, City of Detroit, County of Wayne, Panhandle Eastern Pipe Line Company.

* * * * * * * *

November 13, 1947. Findings and order entered issuing certificate of public convenience and necessity pursuant to application filed 6/27/47, without prejudice to future Commission action in matters now pending in Docket No. G-353; upon the condition that (1) applicant shall obtain from Securities and Exchange Commission such approvals as are necessary to the financing of the construction of the proposed facilities; (2) jurisdiction be retained in the Commission for future disposition of the application insofar as disposition thereof is not made by the certificate granted herein; (3) certificate granted herein shall not authorize applicant to continue operations after 12/31/51, or discontinue operations before 12/31/51, without further authorization by the Commission; and requiring applicant to report dates of completion of construction of facilities and commencement of operation.

* * * * * * * *

[fol. 589] PLAINTIFF'S EXHIBIT 29

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

Before Commissioners: Nelson Lee Smith, Chairman; Claude L. Draper, Leland Olds and Harrington Wimberly

November 13, 1947.

Docket No. G-834, Docket Nos. G-839 and G-918

In the Matters of AUSTIN FIELD PIPE LINE COMPANY. MICHIGAN CONSOLIDATED GAS COMPANY.

FINDINGS AND ORDER ISSUING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

Austin Field Pipe Line Company (Austin Field Company), on December 13, 1946, filed an application at Docket No. G-834 for a certificate of public convenience and necessity pursuant to Section 7 (c) of the Natural Gas Act, as amended, authorizing the construction of certain natural-gas facilities for the transportation of natural gas from the Austin and Reed City gas storage fields near Big Rapids, Michigan, to the city gates of Mt. Pleasant, Ann Arbor and Detroit, Michigan.

The Austin Field Company proposes to construct the following described facilities:

(i) A 26" O. D. steel pipe line, approximately 140 miles in length, from a point at the Austin Storage Field near the common corner of Sections 3, 4, 9 and 10 in Austin Township, Mecosta County, Michigan, to a point near the southwest corner of Section 35, Township 1, North, Range 10 East, Southfield Township, Oakland County, Michigan, connecting the Austin Gas Storage Field with a metering station at or adjacent to the gas distribution system of Michigan Consolidated Gas Company for the Detroit District, which proposed transmission line is hereinafter refer-ed to as the "Austin-Detroit Line";

(ii) A 6⅝" O. D. steel pipe line, approximately 25 miles in length, from the proposed Austin-Detroit Line at a point located near the intersection of Rowe and Milford Roads, Section 3, Township 2 North, Range 7 East, Milford Township, Oakland County, Michigan, to a metering station at

[fol. 590] 847 Broadway, Ann Arbor, Washtenaw County, Michigan, connecting the proposed Austin-Detroit Line with a metering station at or adjacent to the gas distribution system of Michigan Consolidated for the Ann Arbor District, which proposed pipe line is hereinafter referred to as the "Ann Arbor Lateral";

(iii) A 6⅝" O. D. steel pipe line, approximately 10 miles in length, from a point in Richland Township, Montcalm County, Michigan, to a point in Union Township, Isabella County, Michigan, connecting the Austin-Detroit Line with a metering station located near Mt. Pleasant, Isabella County, Michigan; and adjacent to the gas distribution system of Michigan Consolidated in its Mt. Pleasant District, which proposed pipe line is hereinafter referred to as the "Mt. Pleasant Lateral";

(iv) A 10¾" O. D. steel pipe line, approximately 4½ miles in length, from a point near the northwest corner of Section 5, Walker Township, Kent County, Michigan, to a point near the southeast corner of Section 11, in said Walker Township, connecting the proposed 22" pipeline of Michigan-Wisconsin Pipe Line Company with a metering station at or adjacent to the gas distribution system of Michigan Consolidated in the Grand Rapids District, which proposed gas transmission pipe line is hereinafter referred to as the "Grand Rapids Lateral";

(v) A 24" O. D. steel pipe line, approximately 22 miles in length from a point in the Austin Storage Field near the common corner of Sections 3, 4, 9 and 10 in Austin Township, Mecosta County, Michigan, to a point in the Reed City Field near the common corner of Sections 29, 30, 31 and 32 in Lincoln Township, Osceola County, Michigan, connecting the Austin Storage Field with the Reed City Field, which proposed pipe line is hereinafter referred to as the "Austin-Reed City Line";

(vi) A gas compressor station (6,000 H. P.) on the Austin-Detroit Line at the Austin Storage Field, which compressor station is hereinafter called the "Austin Compressor Station."[1]

---

[1] This station to be constructed in two phases each to be a 3,000 H. P. installation.

[fol. 591] Michigan Consolidated Gas Company (Michigan Consolidated) on December 26, 1946, filed an application at Docket No. G-839 for a certificate of public convenience and necessity pursuant to Section 7 (c) of the Natural Gas Act, as amended, authorizing the installation of natural-gas facilities consisting in the main of additional wells and gathering lines in the Austin and Reed City Gas Fields.[2] Such facilities are proposed to be used in the operation of the Austin and Reed City fields as gas storage fields.

The Commission, by its order of March 20, 1947, consolidated the proceedings upon the applications at Docket Nos. G-834 and G-839 for the purpose of hearing. After due notice a hearing was held on April 14 and 21 to 23, 1947, concerning the matters involved and the issues presented by the applications.

Prior to the decisions at Docket Nos. G-834 and G-839, Michigan Consolidated, on June 27, 1947, at Docket No. G-918, filed an application for a certificate of public convenience and necessity pursuant to Section 7 (c) of the Natural Gas Act, as amended, authorizing the construction, leasing and operation of facilities necessary to the proposed storage in the Austin Field of gas obtained from Panhandle Eastern and the subsequent withdrawal thereof for distribution in the Detroit District.

Michigan Consolidated requested a certificate authorizing:

(i) The operation by Michigan Consolidated, pending completion of said Michigan-Wisconsin project[3] of the proposed 26" pipe line between Austin Field and Detroit, the proposed metering station at Evergreen, and the initial installation of the proposed compressor station at Austin Field with an installed capacity of 3,000 H. P., which facilities are to be constructed by the Austin Field Pipe Line Company pursuant to the latter's application for a certifi- [fol. 592] cate, which application is now pending before the Commission in Docket No. G-834.

(ii) The construction and operation by Michigan Consolidated of a proposed 26" pipe line connection to extend

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[2] These facilities are described in Exhibit E to application.

[3] For a description thereof, reference is made to the Commission's Opinion No. 147, In the Matter of Michigan-Wisconsin Pipe Line Company, Docket No. G-669.

from the eastern terminus of the above-mentioned Austin-Detroit Line at Evergreen to Melvindale, where natural gas is delivered to Michigan Consolidated by Panhandle Eastern; and the change by Michigan Consolidated of the gas cylinders on the pumps at its existing River Rouge Station at Melvindale and the continued operation by Michigan Consolidated of said pumps for the purpose of increasing the pressure over that at which the gas is received from Panhandle Eastern.

(iii) The continued operation by Michigan Consolidated, pending completion of the Michigan-Wisconsin project, of its Austin Storage Field insofar as such operation will involve the storage in such field of gas which Michigan Consolidated shall have obtained from Panhandle Eastern.

The Commission, by its order issued August 4, 1947, consolidated the several pending applications at Docket Nos. G-834, G-839 and G-918 for the purpose of hearing. Hearings in the consolidated proceedings were held on August 13, 14, 15 and 19, 1947. Thereafter, a joint motion was filed by Austin Field Company and Michigan Consolidated requesting the omission of the intermediate decision procedure. The motion was granted by the Commission by its order issued September 23, 1947.

The order of September 23, 1947, provided opportunity for all parties to file briefs. Briefs were filed on behalf of the Applicants, Panhandle Eastern Pipe Line Company, an intervener, and by Commission Staff Counsel.

Jurisdiction

Both Michigan Consolidated and Austin Field Company urge that neither company is required to obtain a certificate of public convenience and necessity authorizing the construction or operation of the proposed facilities. In support thereof Austin Field Company contends that, since it does not propose to operate the facilities to be constructed, it will not be a natural-gas company within the meaning of the Act. [fol. 593] On the other hand Michigan Consolidated contends that the construction, lease and operation by it of the proposed facilities are activities wholly in intrastate commerce and not subject to the Commission's jurisdiction.

Austin Field Company was organized as a wholly-owned subsidiary of Michigan Consolidated for the purpose of constructing the Austin-Detroit pipe line and certain ap-

purtenant facilities. Michigan Consolidated elected in this way indirectly to perform this work for which it had contractually committed itself in an agreement with Michigan-Wisconsin Pipe Line Company.

According to the record, "The reason for forming a subsidiary (Austin Field Company) to construct these facilities was to keep this property out from under the mortgage of Michigan Consolidated Gas Company, which mortgage is security for its presently outstanding bonds. When these facilities are sold to Michigan-Wisconsin Pipe Line Company on or before December 31, 1951, it would be necessary, if this property were under the Michigan Consolidated mortgage, to place on deposit with the trustee of Michigan Consolidated's bonds, the amount of money received from Michigan Wisconsin Pipe Line Company. This rather large sum would then remain in the hands of the trustee until net additions equivalent to this amount were substituted for the cash so deposited. The purpose of forming this subsidiary was to prevent the tie-up of a large sum of money for an undetermined period of time following the sale of facilities at the close of the year 1951."

Section 7(c) of the Act, as amended, contemplates that the Commission will closely examine proposals to construct facilities for the transportation or sale of natural gas in interstate commerce prior to the authorization thereof. The facilities proposed to be constructed by Austin Field Company are to be used immediately upon completion for the transportation by Michigan Consolidated of natural gas in interstate commerce. Later they are proposed to be acquired by Michigan-Wisconsin Pipe Line Company and used for the transportation and sale of natural gas in interstate commerce; such acquisition and operation will require further authorization by the Commission.

[fol. 594] As a corporation duly constituted under the laws of the State of Delaware, Austin Field Company is a corporate entity. Even so, for the purposes of administering the Natural Gas Act, we find it to be in effect and in fact an arm or division of the Michigan Consolidated Gas Company. The officers and directors of the two corporations comprise the same personnel, and, with two exceptions, they occupy identical positions in each corporation.

Legitimate though the purpose of organizing this corporation may be, we do not believe that regulation under the Natural Gas Act may be so avoided. Accordingly, we con-

clude that a certificate of public convenience and necessity is required prior to the construction of the proposed facilities by Austin Field Company.

In its application at Docket No. G-918, Michigan Consolidated proposes to lease and operate certain of the facilities to be constructed by Austin Field Company, pending completion of the pipe line project of Michigan-Wisconsin, for the purpose of transporting natural gas received from Panhandle Eastern and having its origin in the Hugoton and Panhandle natural gas fields in the States of Texas, Oklahoma and Kansas. Such gas will be delivered to Michigan Consolidated at, or near Melvindale, Michigan, in close proximity to Detroit.

Such gas will then be compressed at Michigan Consolidated's River Rouge Station and thence transported through a proposed pipe line to a metering station to be constructed at Evergreen, located at a point of interconnection of the proposed 26-inch transmission lines of Michigan Consolidated and Austin Field Company.

It appears from an examination of the evidence that Michigan Consolidated, if it is not now, will, upon completion of construction of the proposed facilities and the commencement of the integrated operation thereof, be engaged in the transportation of natural gas in interstate commerce.

The jurisdictional questions thus posed by the companies have been presented to the Commission in earlier cases,[4] [fol. 595] almost identical in character to those under consideration. In these earlier cases the Commission held the applicants to be natural-gas companies and their proposed construction and operations to be subject to its jurisdiction. It is likewise so concluded with respect to the Applicants and their proposed activities in the instant matters.

Storage Proposal

Market Requirements

Michigan Consolidated proposes to operate the facilities which are the subject of the application in Docket No. G-918 for the purpose of storing in the Austin Field natural gas

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[4] Cities Service Transportation and Chemical Company and Cities Service Gas Company, 3 F. P. C. 598; 4 F. P. C. 647 and 649; see also 3 F. P. C. 1041.

obtained from Panhandle Eastern in off-peak periods in order to meet firm gas sales requirements in its Detroit market.

Michigan Consolidated's estimated firm send-out in the Detroit District during the 12-month period ending March 31, 1949, will be approximately 40,884,000 Mcf, which amount will increase to 41,326,000 Mcf during the next 12-month period. In order to satisfy demands during winter periods when customer firm sales requirements exceed the available daily supply of natural gas, it will be necessary that approximately 3,499,000 Mcf and 3,678,000 Mcf, respectively, be provided from storage or from manufactured gas facilities in each of these annual periods.

To meet these demands Michigan Consolidated expects to have available from its present supplier, Panhandle Eastern Pipe Line Company, (Panhandle Eastern) 45,625,000 Mcf during each of the annual periods ending March 31, 1949, and March 31, 1950. This supply estimate is based upon assumed deliveries by Panhandle Eastern at the rate of 125,000 Mcf per day. Without the storage program such daily delivery, according to the record, is not sufficient to meet the demands of all firm purchasers, including industrials, during winter periods. According to Applicant's witnesses, during the winter 1948-1949 the maximum daily firm demand will be about 238,000 Mcf, and about 240,000 Mcf during the following winter.

In order to meet these estimated requirements on days of maximum demands, Michigan Consolidated has, at [fol. 596] Docket No. G-918, proposed a storage program whereby it will, during off-peak periods, store gas in the Austin Field for subsequent withdrawal and distribution to its consumers in the Detroit area.

According to the record, during off-peak periods and more particularly during the summer months, the 125,000 Mcf a day expected from Panhandle Eastern will make available for storage, over and above the firm requirements of Michigan Consolidated, a total of approximately 8,240,000 Mcf during the 12-month period ending March 31, 1949, and 7,977,000 Mcf for the 12-month period ending March 31, 1950. Michigan Consolidated estimates that the storage of approximately 3,499,000 Mcf during the year ending March 31, 1949, and 3,678,000 Mcf during the following 12 months will enable it to meet its full firm requirements dur-

ing the winter months, when such requirements exceed 125,000 Mcf per day, without the use of any manufactured gas capacity.

This will leave a surplus of gas over Michigan Consolidated's estimated annual firm requirements to the extent of 4,741,000 Mcf and 4,299,000 Mcf for the two twelve-month periods, which will be available for interruptible industrial sales in the Detroit District or for other purposes.

The costs of manufacturing approximately 4,000,000 Mcf of equivalent Btu gas, required to meet Michigan Consolidated's firm requirements during the 1946-47 winter approximated $1.29 per Mcf and applicant's witnesses estimate the cost will rise to approximately $1.35 per Mcf during the 1947-48 winter. To meet corresponding winter requirements through the proposed storage of Panhandle Eastern gas and its return to the distribution mains of Michigan Consolidated's Detroit area will cost only approximately $0.385 per Mcf. It is clear, therefore, that the storage plan before us in these Dockets is economically sound and in the public interest.

Western Districts

The record shows that during the years through 1950, and more generally until the Michigan Wisconsin Pipe Line is completed, unless Michigan Consolidated is enabled to [fol. 597] store gas in the Austin Field in addition to that required for the Detroit District and to use such additional stored gas to augment the supply of gas to its Western Districts, the Company will be seriously short of gas to meet the requirements of such districts.

Natural-gas consumers in Muskegon and Grand Rapids, as well as all other of Michigan Consolidated's Western Districts [5] thus far have been served with gas produced in Michigan. These districts are not connected to any out-of-state sources of supply.

The record further shows that, in order to prevent a deterioration of its local supplies of gas for such Western Districts to the point where breakdown of service to its domestic and commercial customers would be threatened,

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[5] The so-called Western Districts are Grand Rapids, Muskegon, Mt. Pleasant, Big Rapids, and Greenville-Belding.

Michigan Consolidated has notified certain important industrial customers in Grand Rapids and Muskegon that their supplies of natural gas will be terminated December 31, 1947.[6] By cutting off the service to the above-mentioned industrials, the management of Michigan Consolidated estimates that the remaining Michigan reserves available to it will supply all other customers of its Western Districts through the year 1950.

The record shows that service to these industrial customers in Grand Rapids and Muskegon has been long and continuous. During this extended period of service there has not been a single day upon which Michigan Consolidated has found it necessary to interrupt their service. They have, therefore, come to depend upon continuous service and, accrding to applicant's witnesses, under present circumstances are finding it difficult to secure stand-by facilities. In fact it appears that discontinuance of their supply from Michigan Consolidated may result in at least temporary shut downs of production. In contrast, the interruptible industrial customers in the Detroit District, [fol. 598] which will secure the surplus gas available over and above the firm requirements of that district, have been largely taken on during the past two years and generally speaking, have alternative fuel equipment.

As already noted, Michigan Consolidated presently estimates that in the year ending March 31, 1949, it will have available 4,741,000 Mcf of natural gas in excess of the estimated requirements of firm gas customers in the Detroit District. Similarly it is estimated that there will be available in the year ending March 31, 1950, 4,299,000 Mcf of gas. Michigan Consolidated contemplates that such volumes of gas will be sold to industrials in the Detroit District on an interruptible basis, but they may also be used for meeting any under-estimates in firm gas requirements. Since the estimated consumption of the industrials to be cut off in Muskegon and Grand Rapids totals only 1,522,384 Mcf for the year 1947, (which is the latest data available in the

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[6] It is understood that Michigan Consolidated has agreed to extend the date of cut-off to the extent of allowing each of these customers to take up to 20,000 Mcf during January 1948 in the hope that arrangements can be made for use of stored Panhandle Eastern Gas to augment the supply of these markets.

record) it seems apparent that volumes of gas to be made available from Panhandle Eastern are more than adequate to satisfy the demands of these customers on an annual basis and still leave large volumes available for sale in the Detroit District on an interruptible basis.

Panhandle Eastern is of the opinion that present contractual arrangements with Michigan Consolidated permit the storage by the latter of natural gas received from Panhandle Eastern provided that it is subsequently withdrawn and distributed in the Detroit District. Panhandle Eastern insists, however, that gas purchased under such agreements many not be sold and delivered by Michigan Consolidated outside the Detroit District. Michigan Consolidated has not herein contended otherwise, nor has it sought authorization to transport such gas to or sell in markets other than its Detroit District. Thus it appears that these agreements, or perhaps only such narrow construction thereof, might prevent Michigan Consolidated from using natural gas purchased from Panhandle Eastern for the purposes of alleviating gas shortages elsewhere on its systems.

In consideration of these facts, it would appear desirable and in the public interest that arrangements between Michigan Consolidated and Panhandle Eastern be made so [fol. 599] as to enable Michigan Consolidated to distribute gas obtained from Panhandle in the manner in which the public interest will best be served, and without restriction as to the particular district or market in which the ultimate sale may be made. We believe, however, that the two companies should be afforded an opportunity to make the necessary arrangements for such use of this gas.

In the event Michigan Consolidated and Panhandle Eastern do not or are unable to agree upon some such arrangement within the reasonably near future, the Commission may find it necessary to take appropriate and definite action under the applicable provisions of the Natural Gas Act to assure that public interest be served to the greatest possible degree.

The Commission, having considered the applications and the record thereon with respect to the matters involved and the issues presented, further finds that:

(1) Austin Field Pipe Line Company and Michigan Consolidated Gas Company are corporations organized and existing under the laws of the States of Delaware and Michi-

gan, respectively, with principal places of business at Detroit, Michigan, and, the facilities herein authorized to be constructed and operated by them will be used in the transportation of natural gas in interstate commerce, and such construction and operation are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act, as amended.

(2) Michigan Consolidated's available gas supply is adequate to meet the requirements of the operations therein authorized and the services to be rendered by means of the proposed facilities.

(3) Austin Field Company and Michigan Consolidated are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act, as amended, and the requirements, rules and regulations of the Commission thereunder.

(4) Public convenience and necessity require the construction and operation of the following facilities, which are more fully described in the applications in these pro- [fol. 600] ceedings and the exhibits appended thereto, and certificates therefor should be issued as hereinafter ordered and conditioned, authorizing:

(a) Austin Field Pipe Line Company to—

(i) Construct a 26-inch or 24-inch O. D. steel pipe line,[7] approximately 140 miles in length, extending from the Austin Storage Field to a point at or near Detroit, Michigan;

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[7] It appears from the record herein that, in order to assure the construction of the pipe line facilities authorized herein at the earliest possible date, it may be necessary that such pipe lines be constructed of 24-inch rather than 26-inch pipe as contemplated in the application. Such change, according to the testimony, will probably be necessitated by the fact that applicants are unable to obtain steel plate of a sufficient size to permit fabrication of pipe larger in diameter than 24 inches. However, the capacities of the pipe lines would be approximately the same, if the 24-inch pipe were constructed of a heavier wall and operated at higher pressures. Accordingly, the certificates issued herein will permit the use of either 26-inch or 24-inch diameter pipe.

(ii) Construct a metering station at the terminus of such Austin-Detroit Line at or adjacent to the gas distribution system of Michigan Consolidated for the Detroit District;

(iii) Construct a gas compressor station of 3000 horsepower on the Austin-Detroit Line at the Austin Storage Field;

(b) Michigan Consolidated Gas Company to—

(i) Operate the facilities referred to in subparagraphs (i), (ii) and (iii) of paragraph (a) next above;

(ii) Construct and operate a 26-inch or 24-inch pipe line connection extending from the eastern terminus of said Austin-Detroit Line at Evergreen to Melvindale, Michigan;

(iii) Install certain facilities in and operate its River Rouge Station at Melvindale to enable the transportation of natural gas to the Austin Storage Field; and

(iv) Construct, install and operate facilities in the Austin Storage Field for the storage therein and subsequent withdrawal of natural gas produced outside of the State of Michigan.

(5) Since there is before the Commission for decision no application for authorization to operate facilities other [fol. 601] than those described in paragraph (4) above, it is appropriate in the circumstances that the Commission retain jurisdiction for future disposition of those portions of the applications filed at Docket Nos. G-834 and G-839 wherein authorization is sought for the construction of facilities other than those for which a certificate is herein issued.

The Commission, therefore, orders that:

(A) Certificates of public convenience and necessity be and the same are hereby issued authorizing the Austin Field Pipe Line Company to construct the facilities described in paragraph (4) (a) above, and Michigan Consolidated Gas Company to construct and operate the facilities described in paragraph (4) (b) above, which are more fully described in the applications in these proceedings and the exhibits appended thereto, for the transportation of natural gas as therein set forth, subject to the jurisdiction of the Commission, upon the terms and conditions of this order.

(B) Austin Field Pipe Line Company and Michigan Consolidated Gas Company shall report to the Commission in writing, under oath, the completion date of construction of the facilities hereinbefore described, together with the date of commencement of operations.

(C) These certificates are not transferable and shall be effective only so long as the operations hereby authorized are continued in accordance with the provisions of the Natural Gas Act, as amended, and any pertinent rules, regulations or orders heretofore or hereafter issued by the Commission.

(D) These certificates are granted to Applicants upon the condition that they shall obtain from the Securities and Exchange Commission such approvals as are necessary to the financing of the construction of the proposed facilities, and the grant of the certificate herein authorized shall be without prejudice to any action which may be taken by that Commission.

(E) Nothing herein shall be construed as authorizing the continuance of the operations authorized by the certificate issued herein to Michigan Consolidated beyond December [fol. 602] 31, 1951, or the discontinuance of such operations prior to such date, without further authorization by this Commission.

(F) Jurisdiction be retained in the Commission for future disposition of the applications at Docket Nos. G-834 and G-839 insofar as disposition thereof is not made by the certificates herein granted.

(G) This certificate is without prejudice to future Commission action in matters now pending at Docket No. G-353.

By the Commission.

Leon M. Fuquay, Secretary.

Date of Issuance: November 14, 1947.

PLAINTIFF'S EXHIBIT 30

Michigan-Wisconsin Pipe Line Company
105 West Adams Street
Chicago 3, Illinois, December 15, 1947.

Federal Power Commission, 1800 Pennsylvania Avenue, N.W., Washington 25, D. C.

Gentlemen: Michigan-Wisconsin Pipe Line Company hereby respectfully reports to the Federal Power Commission the commencement of construction of the facilities authorized by the Commission's "Findings and Order Issuing Certificate of Public Convenience and Necessity" of November 30, 1946 In the Matter of Michigan-Wisconsin Pipe Line Company, Docket No. G-669.

Reference is here made to subparagraphs (x) and (xi) of Paragraph (B) of said order which provide as follows:

"(B) This certificate is granted to applicant upon the following terms and conditions:

* * * * *

"(x) That unless otherwise ordered by the Commission, the construction of the facilities herein authorized shall be commenced not later than January 1, 1948.

"(xi) Applicant shall report to the Commission in writing, under oath, the dates of commencement and completion [fol. 603] of the construction of the facilities to which reference is made in Paragraph (A) hereof, together with the dates of commencenient of operation."

As the Commission anticipated in its Opinion No. 147 (p. 15), we met with great difficulty, because of the steel shortage, in our efforts to obtain pipe for the project. In fact, we were advised by A. O. Smith Corporation that, if we had to depend upon its allotment of steel, we probably could not obtain the pipe for several years. Fortunately, we were able to effect an arrangement with Stupp Bros. Bridge & Iron Company (See Exhibit 70 in Dockets G-834, 839 and 918) under which we were able to obtain steel plate for fabrication into pipe by A. O. Smith Corporation. However, we found that, because of insufficient width, this plate was unsatisfactory for use in making 26" pipe but can be used to make 24" pipe.

By increasing the wall thickness from ¼" to 5/16", and operating the 24" diameter pipe at 970# pressure, there is no change in the capacity of the initial project as authorized by the Commission (See Findings and Order of November 13, 1947 in Dockets G-834, 839 and 918, p. 9, n. 7). Moreover, the foregoing permits a reduction of 12,900 in the amount of initial horsepower to be installed, so that the initial installation will be 9,600 horsepower at the Hugoton Station and 3,200 horsepower at Station No. 8.

By reason of the foregoing and the November 19, 1947 order of the Securities and Exchange Commission authorizing the initial financing (Holding Company Act Release No. 7856), we were able to commence construction on December 12, 1947. Construction was commenced by starting trenching operations for the main pipe line and starting the actual laying of pipe for the main pipe line, both operations taking place at the starting point of the line in Section 8, Block 1, Public Free School Lands, Hansford County, Texas; and we are now going forward with construction eastwardly along the right-of-way.

In this connection, we want to point out that the foregoing will not adversely affect the Austin-Detroit line (authorized by the Commission's above-mentioned order of November [fol. 604] 13, 1947 in Dockets G-834, 839 and 918). Construction of that line was also commenced on or about December 10, 1947 and is going forward as rapidly as possible.

In filing this report we desire to assure the Commission that we will make every effort to expedite the construction of the Michigan-Wisconsin project so that we may be in a position to serve the requirements of our markets, the needs of which are daily becoming more acute as the Commission is doubtless aware.

We trust that the foregoing report is satisfactory.

Respectfully, Michigan-Wisconsin Pipe Line Company, by Frank L. Conrad, President.

[Verified.]

Received December 17, '47. Federal Power Commission.

PLAINTIFF'S EXHIBIT 32

Minutes of the Two Thousand One Hundred and Twentieth Meeting

Pursuant to call by the Chairman, the Commission convened at 5:30 p.m., on December 2, 1946.

Present: Chairman Olds, Commissioners Draper, Sachse, Smith and Wimberly.

Action was taken, as set forth in the document appended hereto, in the following matter:

Docket No. G-824, Tennessee Gas and Transmission Company (Order issuing temporary certificate of public convenience and necessity)

Thereupon, the Commission adjourned.

Leland Olds, Chairman.

Attest: Leon M. Fuquay, Secretary.

[fol. 605] PLAINTIFF'S EXHIBIT 34

[Western Union Telegram]

WUR97 43 SER=WUX Dallas Tex 2 1144A

Dec 2 PM 12 2

F. E. Rice=Phillips Pet Co

Under the terms of Section Two Article Two of Contract dated December 7 1945 between Phillips Petroleum Co and Magnolia Petroleum Co affecting certain gas leases located in Dallas, Hansford and Sherman Counties Texas and Texas County Oklahoma, we hereby cancel said contract=

Magnolia Petroleum Co R. M. Chan.

Copied for K. S. Adams, Don Emery, Paul Endacott, R. B. F. Hummer, H. K. Hudson, Geo. P. Bunn, A. M. Rippel.

FER:rs 12/2/46

PLAINTIFF'S EXHIBIT 35

[Western Union Telegram]

RXWUR29 143/142 6 Extra=Tulsa Okla 2 924 A

Phillips Petroleum Co. Report time of delivery=

Please refer to that certain contract, dated December 5, 1945, between Phillips Petroleum Company, as "Buyer", and Stanolind Oil and Gas Company, as "Seller", covering the sale and purchase of natural gas produced from certain leases owned by Stanolind Oil and Gas Company in Sherman and Hansford Counties, Texas, and Texas County, Oklahoma, with particular reference to Section 2 of Article 11 thereof.

You are hereby notified that Stanolind Oil and Gas Company hereby terminates the aforesaid contract of December 5, 1945, between Phillips Petroleum Company, as "Buyer", and Stanolind Oil and Gas Company, as "Seller" for the reason that Michigan-Wisconsin Pine Line Company failed [fol. 606] to secure, on or before October 1, 1946, a certificate of public convenience and necessity for the construction and operation of its pipe line and has not since secured such certificate=

Stanolind Oil and Gas Company, by E F Bullard, President.

PLAINTIFF'S EXHIBIT 36

[Western Union Telegram]

WUR229 75 3 Extra=Tulsa Okla 2 441P

1946 Dec 2 PM 5 0

Phillips Petroleum Co=

Received today your telegram dated yesterday advising that certificate was issued to Michigan-Wisconsin Pipeline Company on November thirtieth. We are informed at 4 o'clock Central Standard Time today that said certificate has not yet issued therefore we hereby exercise our right under Section Two of Article Two of the written contract of December 5 1945 between your company and Skelly Oil

Company to terminate and we do hereby terminate said contract=

Skelly Oil Co, by Chesley C Herndon, Vice President.

Copied for Messrs. K. S. Adams, Don Emery, Paul Endacott, Geo. P. Bunn, R. B. F. Hummer, H. K. Hudson, A. M. Rippel.

FER:rs 12/3/46

NOTE RE PLAINTIFF'S EXHIBIT 37-45

Plaintiff's Exhibits Nos. 37-45—Affidavits of Telegrams Received

Plaintiff's exhibits 37 to 45, inclusive are respectively affidavits of Floyd Green, Attorney, Corporation Commission of Oklahoma; Tom McMurray, Secretary, Corporation [fol. 607] Commission of Oklahoma; Edward T. Kaveny, Secretary, Public Service Commission of Wisconsin; Hannah Kellner, employee of Miller, Mack and Fairchild; Van Atta, Batton & Harker, attorneys; Henry M. Bruestle, City Solicitor, Cincinnati, Ohio; G. P. Garver, Secretary, Natural Gas Pipe Line Company; Dale H. Fillmore, Corporation Counsel, City of Dearborn, Michigan; and letter of Lawrence I. Shaw, Attorney for Northern Natural Gas Company, each attaching copy of the telegram which is set out in full in Plaintiff's Exhibit No. 7, being the telegram signed by Leon M. Fuquay, Secretary of the Federal Power Commission, advising that the Commission on November 30, 1946 issued a Certificate of Public Convenience and Necessity, with conditions, to Michigan-Wisconsin Pipe Line Company in Docket No. G-669. Each telegram shows dispatch from Washington, D. C. at 7:39 or 7:40 P. M., November 30, 1946 and receipt at receiving Western Union offices soon thereafter. Some affiants state personal recollection of delivery of telegram to them as addressees on November 30, 1946. Affiants are some of the addressees or representatives of some of the addressees whose names appear on the list attached to the telegram as prepared by Fuquay, which telegram and list is shown in this record as Plaintiff's Exhibit No. 7.

Note Re Plaintiff's Exhibits 46-49

Plaintiff's Exhibits Nos. 46 through 49—Newspaper pages and clippings.

These exhibits are pages or clippings from newspapers of Sunday, December 1, 1946, namely the Milwaukee Journal, New York Herald Tribune, The Washington Post and the Detroit Times. In language not important here each of these newspapers reported that the Federal Power Commission at Washington, D. C., on Saturday, November 30, 1946, authorized the proposed pipe line project of Michigan-Wisconsin Pipe Line Company for an $84,000,000.00 natural gas pipe line between Texas and Michigan and Wisconsin. The New York Herald Tribune article bore a date line as follows: "Washington, Nov. 30 (AP)" The Detroit Times article [fol. 608] bore this date line: "Washington, Nov. 30." The other two items showed no date line.

Note Re Plaintiff's Exhibit 50

Plaintiff's Exhibit No. 50—Photostatic copies of two documents in files of F. P. C. mail room relating to dispatch of registered mail.

Plaintiff's Exhibit 50 consists of two sheets, being a photostat copy of documents in the files in the Federal Power Commission's mail room relating to the dispatch of registered mail. Each sheet is dated December 2, 1946 and together the two sheets show that the Commission placed in a packet, having on it Lock No. B8743, Rotary No. 308, three letters to be sent by registered mail, one addressed to Frank L. Conrad, Michigan-Wisconsin Pipe Line Company, 105 West Adams Street, Chicago, Illinois, another to John S. L. Yost, Panhandle Eastern Pipe Line Company, 120 Broadway, New York, N. Y., and another to A. J. Mayotte, Michigan Gas Storage Company, 212 Michigan Avenue, Jackson, Michigan, and show that said letters were given postoffice registry numbers R-443504, R-443505 and R-443506, respectively. The first sheet shows the postmaster's receipt by Stephen A. Lee, receiving clerk.

PLAINTIFF'S EXHIBIT 51

United States of America. Securities and Exchange Commission

I, Nancy H. Mattila, Chief, Docket, Mail and Files Section of the Securities and Exchange Commission, Washington, D. C., which Commission was created by the Securities Exchange Act of 1934 (15 U. S. C. A., Sec. 78a et seq.), and acting official custodian of the books and records of said Commission, and all books and records created or established by the Federal Trade Commission, pursuant to the provisions of the Securities Act of 1933 and transferred to this Commission in accordance with Section 210 of the Securities Exchange Act of 1934, do hereby certify that attached is a [fol. 609] full, true and complete copy of: Memorandum opinion and Order of this Commission dated November 19, 1947, in the matter of The United Light and Railways Company, American Light and Traction Company, et al., File Nos. 59-11, 59-17, and 54-25 (Public Utility Holding Company Act of 1935). In witness whereof I have hereunto subscribed my name and caused the seal of the Securities and Exchange Commission to be affixed this 15th day of January, A. D., 1948, at Washington, D. C.

Nancy H. Mattila, Chief, Docket, Mail and Files Section. (Seal.)

SECURITIES AND EXCHANGE COMMISSION, PHILADELPHIA

Holding Company Act of 1935. Release No. 7856

In the Matter of the UNITED LIGHT AND RAILWAYS COMPANY, AMERICAN LIGHT & TRACTION COMPANY, et al. File Nos. 59-11, 59-17 and 54-25. (Public Utility Holding Company Act of 1935)

Memorandum Opinion

Simplification of Holding Company System

ISSUANCE OF INTERIM ORDER PENDING ACTION ON SECTION 11 (E) PLAN

Request included in Section 11 (e) Plan of registered holding company for interim order approving (a) immedi-

ate investment of treasury funds in additional common stock of non-utility subsidiary and (b) prompt sales of shares of non-retainable utility company, granted and transactions approved, subject to reservation of jurisdiction on certain phases of such transactions.

(Appearances omitted by stipulation of the parties to this appeal.)

There is presently before us for decision the Section 11 (e) Plan jointly filed by The United Light and Railways Company ("Railways") and its subsidiary, American Light & Traction Company ("American"), both registered holding companies, for compliance with Section 11 (b) of the [fol. 610] Public Utility Holding Company Act of 1935 ("the Act") and an outstanding order of this Commission issued on August 5, 1941.[1] Included in that Plan is a request that if the Commission cannot enter an immediate order approving the Plan in its entirety, a separate or interim order should be entered "to avoid loss of valuable rights and delays injurious to the public interest" authorizing (a) the immediate investment by American from treasury funds now on hand of $4,000,000 in the common stock of Michigan-Wisconsin Pipe Line Company and (b) the prompt sale by American of 450,000 shares of common stock of the Detroit Edison Company.

Hearings on the Plan as amended, which is identified as Application No. 31, have been completed. We have heard oral argument, and briefs have been filed. The request for an interim order is contained in the second amendment to the Plan, filed on October 27, 1947. That request was duly noticed along with the other provisions of the second amendment,[2] and all participants have had an opportunity to argue the question of the need for and the propriety of issuing a separate order in advance of our disposition of the entire Plan.

We have determined to grant applicants' request for a separate order and to approve both proposals forthwith, although we do not now express our approval or disap-

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[1] The United Light and Power Company, et al., 9 S. E. C. 833 (1941).

[2] Notice and Order Reconvening Hearing, Holding Company Act Release No. 7805 (October 28, 1947).

proval of the Plan in its entirety or of any of its other provisions. Our findings and opinion on the entire Plan will be issued at a later date.

The present Plan is proposed as a method for bringing the American holding company system into compliance with the Act and advancing compliance by Railways through the divestment by it of its investment in American and its subsidiaries, and by various other steps. Many of the transactions in Application No. 31 relate to a proposed interstate natural gas pipe line to be constructed by Michi- [fol. 611] gan-Wisconsin Pipe Line Company ("Michigan-Wisconsin") and by Austin Field Pipe Line Company ("Austin"), subsidiaries in the American system, under Certificates of Convenience and Necessity issued by the Federal Power Commission.[3] When completed the line would bring natural gas from the Hugoton field in Texas to serve communities in the States of Michigan and Wisconsin.

The F.P.C. Certificate of November 30, 1946, contains the following condition (Docket No. G-669):

"(x) That unless otherwise ordered by the Commission, the construction of the facilities herein authorized shall be commenced not later than January 1, 1948."

Although the order granting the Certificate has been modified or supplemented on three occasions since its issuance, there has been no relaxation of this condition. It seems clear, therefore, that in the absence of a change in the order, applicants must commence construction by the first of the year or forfeit the Certificate. In addition to this condition in the Certificate, a further deadline is contained in a contract covering the supply of natural gas for the line which requires construction to be commenced by March 1, 1948.

Before any construction can begin, Michigan-Wisconsin must obtain the necessary rights-of-way for the line and a

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[3] An F. P. C. Certificate of November 30, 1946, covers the construction and operation of the transmission line of Michigan-Wisconsin. A Certificate to construct and operate the Austin and Reed City storage fields and the Austin Field pipe line to Detroit and Ann Arbor was issued, subject to conditions, on November 13, 1947.

supply of pipe and construction materials delivered to the site. No rights-of-way have as yet been acquired, such acquisitions having been held up pending approval by this Commission of the financing of the line. The companies have entered into various contracts which appear to assure a supply of pipe. However, these contracts, which provide for periodic deliveries starting in August 1947, require payments for deliveries to be made at monthly intervals, ten days after receipt of delivery, beginning December 31, 1947, and may be cancelled by the fabricator if payments cannot me made by that date.

[fol. 612] The urgency of the time pressures confronting Michigan-Wisconsin if it is to fulfill the conditions of the Certificates of Convenience and Necessity granted by the F.P.C. and the terms of its supply contracts has been repeatedly noted in these proceedings. We have made every effort, consistent with our obligation under the statute to afford participants a full and fair hearing and to explore fully the issues raised by the application, to accelerate the proceedings before us. It appears that any delay in passing on the two proposals now before us might, in effect, foreclose the entire pipe line project, a project which has been found by the F.P.C. to be in the public interest, and might be equivalent to a denial on the merits of this phase of the Plan. Opponents of the Plan have asserted that this is a "manufactured crisis," conceived by applicants to pressure this Commission into hasty and imprudent action on the Plan. Thus, the brief filed by Panhandle Eastern Pipe Line Company in opposition to the Plan states that no justification exists for granting applicants' request for an immediate order and points out in this connection that the condition in the F.P.C. Certificate expressly contemplates that a later time schedule might be "otherwise ordered by the Commission i.e., the F.P.C.," but that applicants have never made any effort to obtain any modification in the condition, nor have they tried to obtain extensions from their gas suppliers. We are cognizant that these possibilities are open to applicants, but we can have no assurance that any such modifications and extensions, if now sought, would be granted, or, if granted, would come in time to assist our deliberations. We believe, therefore, that it is proper to grant applicants' request to sever and decide immediately the two issues which have been presented as most urgent. Flexibility of administration to meet emer-

gency conditions is an important reason for the existence of administrative agencies, and we believe that the situation here presented is a proper situation for its exercise.

The variety of issues raised by the Plan and the extensive record which has been developed prevent our issuing complete findings and opinion on the Plan at this time. We do think it is possible, however, to pass upon the two proposals, without now deciding all of the issues raised by [fol. 613] the Plan. In this connection, it may be noted that we have gained a particularly detailed familiarity with this matter and the present Plan in the course of the extended proceedings by reason of the frequent occasion for the Commission consideration and Commission opinions which have marked the history and background of these proceedings. American's original plan (Application No. 21), which provided for liquidation of the company, came to us twice on important preliminary matters before being presented for decision.[4] After argument on the original plan we issued our Findings and Opinion.[5] This was subsequently withdrawn, reargument on the original plan was had.[6] The present application was filed before a second decision was reached. The provisions of this application, in turn, have already been before us on two occasions: on a petition filed by Allied Chemical & Dye Corporation, a large stockholder, to stay proceedings on the Plan,[7] and subsequently after filing of the first amendment, on a motion to dismiss by the staff of our Public Utilities Division.[8] In both instances we heard oral argument at length, and entered written opinions. We have also heard full argument on the Plan as finally amended and have examined the briefs of participants. Throughout the foregoing proceedings, as well as in separate applications on two occasions in which we approved interim financing,[9] the pipe line project has been discussed and considered. Under the circumstances, we believe that we are in a position to decide the matter of further interim financing for the pipe line in advance of our decision on the other issues raised by the Plan and that, for the reasons indicated above, such matter should be decided immediately.

The proposal to use treasury funds of American to purchase $4,000,000 of Michigan-Wisconsin common stock is

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(Footnotes 4 to 10 inclusive omitted by stipulation of the parties to this appeal.)

related to the provision in the Plan under which American proposes to purchase up to $25,000,000 of such stock to provide equity capital to finance the pipe line. The issuance of that stock has already been approved by the Michigan State Commission. The initial $4,000,000 is expected to include the cost of installing the first 50 miles of pipe at the starting point of the line. It is planned to complete this part before the end of this year.

[fol. 614] In requesting approval of this transaction in advance of our decision on the entire plan, applicants recognize, and we agree, that this interim financing may be considered as severable from the Plan in its entirety and may be tested by the standards of the Act specifically applicable to such financing. The issue thus presented is similar to that raised by the two previous applications in which we approved requests for interim financing of the pipe line project.[10] We have therefore examined this proposal under the applicable provisions of Sections 6, 7, 10 and 12 of the Act. We find no occasion for making adverse findings or for imposing terms and conditions. Section 10 (c) (1) provides that the Commission shall not approve an acquisition of securities by a holding company which would be "detrimental to the carrying out of the provisions of section 11." We do not believe the proposed acquisition will be detri*mental to the carrying out of the provisions of section 11.*" our consideration of the entire Plan that the pipe line is retainable as part of an integrated system, then our approval of the present acquisition will have affirmatively contributed to the creation of an integrated system; on the other hand, if it is found that the pipe line may not be retained under Section 11 (b), provision can then be made for its disposition and the problem of disposition in that event would not be substantially different after this additional investment than it is now as a consequence of our already having approved interim financing on two previous occasions. We, therefore, approve the proposed sale and acquisition of securities, and our order shall so provide.

In authorizing these expenditures at this time we recognize that the order of the F.P.C. granting the Certificate of November 30, 1946, is on appeal before the Court of Appeals for the District of Columbia. We are aware of the

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(Footnotes 4 to 10 inclusive omitted by stipulation of the parties to this appeal.)

possibility that the Certificate may be reversed by the Court, as well as of the further possibility that the F.P.C. itself may desire to reconsider its Certificate by reason of changed conditions. The commencement of construction under these circumstances obviously has elements of risk in it, yet it [fol. 615] does not appear that applicants can avoid that risk unless they violate an express condition of the Certificate requiring the commencement of construction by January 1, 1948, or unless they seek, and obtain, from the F.P.C. an extension of time. There are also other obstacles which must be overcome before the project can become a reality. The responsibility for the decision on whether or not to go forward in the light of these contingencies is primarily on management. We agree with the contention made by counsel for Allied Chemical & Dye Corporation that various provisions of the Act place important restrictions on the freedom of managerial judgment in many spheres, but our authorization of the proposed financing represents our considered conclusion that none of the applicable provisions of the Public Utility Holding Company Act requires that we override the management's decision to go forward with the project to the extent involved herein.

The second proposal is to sell promptly 450,000 shares of Detroit Edison stock, out of 1,289,205 shares now owned by American. None of the participants has made any specific objection to approving this sale. There is no request at this time for approval of any particular disposition of the proceeds. Testimony of applicants' witness indicates that the proceeds, which are estimated roughly at $10,000,000, will be added to the cash funds of American, replenishing the expenditure being made for Michigan-Wisconsin stock, and will be held available for use in connection with consummating the Plan, if and when it is approved by this Commission. Disposition of the Detroit Edison stock is in accord with our Order of August 5, 1941 requiring American to dispose completely of its interest in Detroit Edison and the sale of 450,000 shares, or slightly over one-third of the holdings, at this time is an appropriate step in compliance with our Order.

It appears that the proposed sale will be made in accordance with our competitive bidding rules, but that the full terms and details of the sale are not now in the record. In approving the sale of the Detroit Edison stock we shall accordingly reserve jurisdiction until applicants have filed

up-to-date financial statements for Detroit Edison, copies [fol. 616] of the bidding papers and other relevant data needed for our review of the transaction under the applicable standards of the Act. This material should be filed not later than twenty days prior to the date on which the sale of the stock is contemplated. At that time, we shall give public notice of the proposed details of the disposition and any interested person may request a hearing within five days. If those details are consistent with the standards of the Act, we shall approve them, reserving jurisdiction to pass upon the results of the competitive bidding after such bidding has taken place.

Because of the short time remaining for applicants to initiate construction of the pipe line and because of the time pressures inherent in this proceeding, we find that due and timely execution of our functions imperatively and unavoidably requires that our decision herein should not be preceded by any intermediate decision and that we should not delay the effective date of our order herein.[11] Accordingly, an appropriate order will issue and will be effective immediately.

By the Commission (Chairman Caffrey and Commissioners McConnaughey, McEntire, Hanrahan, and McDonald). Orval L. DuBois, Secretary. (Seal.)

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[11] For the same reason, we have felt compelled to deny the various requests made by some of the participants herein to postpone the time for oral argument and filing of briefs beyond the time originally set in our order of October 28, 1947 (Holding Company Act Release No. 7805).

UNITED STATES OF AMERICA

Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pa., on the 19th day of November, A. D. 1947.

In the Matter of UNITED LIGHT AND RAILWAYS COMPANY, AMERICAN LIGHT & TRACTION COMPANY, et al.

File Nos. 59-11, 59-17 and 54-25

(Public Utility Holding Company Act of 1935)

[fol. 617] ORDER

The United Light and Railways Company and American Light & Traction Company, both registered public utility holding companies, having filed a (?) pursuant to Section 11 (e) of the Public Utility Holding Company Act of (?)5, such plan including a request for severance and immediate approval of (?) acquisition by American Light & Traction Company of 40,000 additional shares of common stock, $100 par value, of its non-utility subsidiary, Michigan-Wisconsin Pipe Line Company, and for immediate approval of the sale, pursuant to Rule U-50, of 450,000 shares of common stock of the Detroit (?)son Company; hearings having been had on such plan at which all interested persons were given an opportunity to appear and be heard, the matter having been taken under consideration, and the Commission having this day issued (?) findings and opinion herein;

It is ordered on the basis of said findings and opinion that American Light & Traction Company may purchase with treasury funds up to 40,000 additional shares of the common stock of Michigan-Wisconsin Pipe Line Company, at the par value thereof of $100 per share; it is

Further ordered that the issuance and sale of the aforesaid securities (?) Michigan-Wisconsin Pipe Line Company be and the same hereby are exempt from the provisions of Section 6 (a) of the Public Utility Holding Company Act of 1935; and it is

Further ordered that jurisdiction be and hereby is reserved over the (?)position by American Light & Traction Company of the shares of Michigan-Wisconsin Pipe Line

Company now owned by it and any additional shares purchased pursuant to this order; and it is

Further ordered that American Light & Traction Company be and hereby is authorized to dispose through sale, pursuant to the rules of this Commission, of 450,000 shares of common stock of the Detroit Edison Company, (?)isdiction being reserved to consider and pass upon the terms and details of such sale, and jurisdiction being further reserved [fol. 618] to issue such further orders as may be appropriate to the carrying out of the transaction.

By the Commission. Orval L. DuBois, Secretary. (Seal.)

PLAINTIFF'S EXHIBIT 52

UNITED STATES OF AMERICA, SECURITIES AND EXCHANGE COMMISSION

I, Nancy H. Mattila, Chief, Docket, Mail and Files Section of the Securities and Exchange Commission, Washington, D. C., which Commission was created by the Securities Exchange Act of 1934 (15 U.S.C.A., Sec. 78a et seq.), and acting official custodian of the books and records of said Commission, and all books and records created or established by the Federal Trade Commission, pursuant to the provisions of the Securities Act of 1933 and transferred to this Commission in accordance with Section 210 of the Securities Exchange Act of 1934, do hereby certify that attached is a full, true and complete copy of: Findings and opinion and order of this Commission dated December 30, 1947, in the matter of The United Light and Railways Company, American Light and Traction Company, et al., File Nos. 59-11, 59-17, and 54-25 (Public Utility Holding Company Act of 1935).

In witness whereof I have hereunto subscribed my name and caused the seal of the Securities and Exchange Commission to be affixed this 15th day of January, A. D., 1948, at Washington, D. C.

Nancy H. Mattila, Chief, Docket, Mail and Files Section. (Seal.)

For Release in Morning Newspapers of Wednesday, December 31, 1947.

SECURITIES AND EXCHANGE COMMISSION

Philadelphia

Holding Company Act of 1935. Release No. 7951

[fol. 619] In the Matter of THE UNITED LIGHT AND RAILWAYS COMPANY, AMERICAN LIGHT & TRACTION COMPANY, et al.

File Nos. 59-11, 59-17 and 54-25

(Public Utility Holding Company Act of 1935)

FINDINGS AND OPINION OF THE COMMISSION

Simplification of Holding Company System

Plan Under Section 11 (e)—Necessity

Where a plan under Section 11 (e) provides for construction of interstate natural gas transmission line to supply gas to two gas utility company subsidiaries and permit their coordinated operation, found, gas utility companies will be an integrated system under Section 2 (a) (29) (B), and pipe line subsidiary may be retained as a related other business under Section 11 (b) (1).

Plan under Section 11 (e) providing for construction and operation of interstate natural gas transmission line to serve integrated gas utility system and for continuance of holding company over such properties, held, "necessary" to effectuate the provisions of Section 11 (b).

Plan under Section 11 (e) providing for divestment of nonretainable properties and for separation of holding company systems in compliance with previously issued order of Commission under Section 11 (b) (1), held, "necessary" to effectuate the provisions of Section 11 (b).

Plan under Section 11 (e) providing for simplification of capital structures through retirement of debt and preferred stock of holding company and by making offer to purchase outstanding preferred stock of sub-holding company for retirement, held, "necessary" to effectuate the provisions of Section 11 (b).

Plan Under Section 11 (e)—Fairness and Equity

Plan under Section 11 (e) providing for offer to purchase outstanding preferred stock of sub-holding company for retirement at price of $33 per share plus accrued dividends, held fair and equitable to persons affected thereby.

Plan under Section 11 (e) providing for divesting non retainable properties through dividend distributions to [fol. 620] stockholders in lieu of cash, by special distributions to stockholders, through public sale, and *though* offering to stockholders on warrants, held, fair and equitable to persons affected thereby.

Plan under Section 11 (e) providing for retirement of outstanding debt and preferred stock of holding company at redemption prices thereof, held, fair and equitable to persons affected thereby.

Issuance and Acquisition of Securities

Where plan under Section 11 (e) provides for issuance of debt securities by holding companies and application of proceeds to retire outstanding preferred stocks, held, under circumstances and in view of provisions for periodic reduction, that issuance and sale of securities may be approved under applicable standards of Section 7.

Where plan under Section 11 (e) provides for initial financing of interstate natural gas transmission line project through investment by holding company of $25,000,000 in common stock of pipe line company, held, issuance and acquisition of securities meets applicable standards of Sections 7, 9, 10, and 12, and may be permitted under provisions of the Holding Company Act.

(Appearances omitted by stipulation of the parties to this appeal.)

The United Light and Railways Company ("Railways") and its subsidiary, American Light & Traction Company ("American") have filed a joint plan pursuant to Section 11 (e) of the Public Utility Holding Company Act of 1935 ("the Act"). The plan is identified as Application No. 31.

Briefly, the plan as amended provides for the continuation of American as a holding company over Michigan Consolidated Gas Company ("Michigan Consolidated"), Milwaukee Gas Light Company ("Milwaukee"), and Michigan-

Wisconsin Pipe Line Company ("Michigan-Wisconsin"), and their subsidiaries; for the financing of Michigan-Wisconsin; for an offer by American to its preferred stockholders to retire their stock at $33 per share; for the dis- [fol. 621] position by American of its investments in The Detroit Edison Company and Madison Gas and Electric Company ("Madison"); for the disposition by Railways of its interests in American and its subsidiaries; and for simplification of the capital structure of Railways. The plan is proposed as a method for achieving compliance by American with the standards of Section 11 (b) and the terms of an outstanding order of this Commission dated August 5, 1941,[1] and for advancing compliance by Railways with those requirements.

Hearings on the original plan and on the amendments have been held before a hearing officer. We have heard oral argument and briefs have been filed. Opposition to the plan, directed principally against those features pertaining to the construction and operation of the interstate natural gas transmission line by Michigan-Wisconsin, was strongly voiced by Allied Chemical & Dye Corporation ("Allied"), a substantial holder of preferred and common stock of American;[2] by Panhandle Eastern Pipe Line Company ("Panhandle"), a non-affiliated company, and the present supplier of natural gas to Michigan Consolidated which is to be the principal market of the new pipe line in competition with Panhandle; by the City of Detroit; and by certain common stockholders of American.[3] Other objections to the

[1] The United Light and Power Company, 9 S.E.C. 833 (1941).

[2] Allied owns 234,912 shares of preferred and 119,200 shares of common stock of American, constituting 10.7% of the voting power.

[3] Certain common stockholders represented in this proceeding by Mr. Arthur G. Logan are also substantial stockholders of Panhandle Eastern Pipe Line Company. It should be noted that Logan appeared in the proceedings on Application No. 21 on behalf of Panhandle. He has not obscured his continuing relationship with that company. See The United Light and Power Company, — S.E.C. — (1946), Holding Company Act Release No. 6905, at mimeo. p. 7, n. 16.

plan, including Allied's dissatisfaction with the proposal for retiring American's preferred stock, will be discussed in the course of this Opinion. The plan is supported by certain common stockholders of both Railways and American, as well as by applicants. Upon a review of the record, we make the following findings.

[fol. 622] Description of the System

1. The United Light and Railways Company.

Railways is a Delaware corporation and a registered holding company. Following the dissolution of The United Light and Power Company to comply with Section 11 (b) of the Act,[4] Railways became the top company in the holding company system. At the present time its assets consist principally of investments in two subsidiary holding companies, American and Continental Gas & Electric Corporation ("Continental Gas"), and in one operating company, Iowa-Illinois Gas and Electric Company. The United Light and Railways Service Company, a service company for the system, is also a direct subsidiary of Railways.

Railways owns 37.76% of the outstanding preferred stock and 54.69% of the outstanding common stock of American, constituting approximately 51.94% of the voting power. Railways also owns approximately 99.86% of the outstanding common stock of Continental Gas and all of the outstanding capital stock of Iowa-Illinois.

The capital structure and properties of American are described below. Continental Gas, a registered holding company, has assets consisting principally of investments in the common stocks of Kansas City Power & Light Company, St. Joseph Light & Power Company, Eastern Kansas Utilities, Inc., Iowa Power and Light Company and Maryville Electric Light and Power Company, which companies own and operate various electric and gas utility properties in the states of Kansas, Missouri and Iowa. Iowa-Illinois is a public utility company operating gas, electric and transportation properties in the states of Iowa and Illinois.

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[4] The United Light and Power Company, 13 S.E.C. 1 (1943), plan approved and enforced, 51 F. Supp. 217 (D. Del. 1943), affirmed sub nom. Otis & Co. v. S.E.C., 142 F. 2d 411 (C.C.A. 3, 1943), 323 U.S. 624 (1945).

Railways owes $25,000,000 to various commercial banks. The loan bears interest at the rate of 2% per year and is renewable annually, with the approval of this Commission until December 10, 1950.[5] Railways' capitalization consists [fol. 623] of $18,983,800 par value of three series of cumulative prior preferred stock, bearing dividends at the annual rate of 7%, 6.36% and 6%, respectively, and 3,173,338 shares of $7 par value common stock.

Corporate and consolidated balance sheets of Railways at April 30, 1947, and corporate and consolidated statements of income for the 12 months ended that date, are attached as Appendix A to this Opinion.

2. American Light & Traction Company.

American is a New Jersey corporation and a registered holding company. It owns all of the outstanding common stocks of Michigan Consolidated, Madison and Michigan-Wisconsin; approximately 99.5% of the outstanding common stock of Milwaukee; and approximately 20.3% of the outstanding common stock of The Detroit Edison Company. In addition, American has cash and government securities substantially in excess of current liabilities.

American has no funded debt and no bank loans. It has outstanding 536,324 shares of 6% cumulative, non-callable, preferred stock, having a par value of $25 per share and a preference on voluntary or involuntary liquidation of $25 per share; and 2,768,050 shares of $25 par value common stock. Both classes of stock have full voting rights.

Corporate and consolidated balance sheets of American Light at April 30, 1947, and corporate and consolidated statements of income for the 12 months ended that date, are attached as Appendix B to this Opinion.

The following is a description of the subsidiary companies in the American system:

a. Michigan Consolidated Gas Company.

Michigan Consolidated is a Michigan corporation and is engaged in the purchase, distribution and sale of natural

[5] The United Light and Railways Company, Holding Company Act Release No. 7900 (December 8, 1947). The renewal dates are December 31, 1948 and December 31, 1949. We have approved renewal of the loan for the period expiring December 31, 1948.

gas in the following communities and adjacent areas in the state of Michigan: Detroit, Grand Rapids, Muskegon, Ann Arbor, Mt. Pleasant, Greenville, Belding and Big Rapids. It is also engaged in the production, distribution and sale of casing-head gas in Muskegon, and of manufactured gas [fol. 624] in Ludington, Michigan. At the present time, natural gas for sale in Detroit and Ann Arbor is secured by contract from the Panhandle Eastern Pipe Line Company. This supply is supplemented by manufactured gas. Michigan Consolidated also owns gas wells and has gas rights in west central Michigan the output of which is used to service the other Michigan communities. Its business is conducted entirely within the State of Michigan. Its service area had an estimated aggregate population in 1940 of 2,345,600, of which 1,959,600 were in the Detroit district. Approximately 81% of its operating revenues for 1946 was derived from the sale of gas in the Detroit district.

Michigan Consolidated is under the jurisdiction of the Michigan Public Service Commission which has broad regulatory powers over the company, including jurisdiction over the fixing of rates and charges, and the issuance of securities.

Michigan Consolidated has the following securities outstanding:

First Mortgage Bonds, 3-½% Series, due 1969	$38,000,000
First Mortgage Bonds, 2-⅞% Series, due 1969	$ 6,000,000
4-¾% Cumulative Preferred Stock, $100 par	$ 4,000,000
Common Stock, $14 par	3,044,855 shares

All of the bonds and preferred stock are publicly held. A balance sheet dated April 30, 1947, and an income statement for the 12 months ended that date, are attached as Appendix C to this Opinion.

b. Milwaukee Gas Light Company.

Milwaukee, a Wisconsin corporation, is a gas utility company, furnishing manufactured gas to the City of Milwaukee and the surrounding metropolitan area; having a combined population of about 800,000.

During 1946, approximately 31.77% of its gas requirements was supplied from the company's own manufacturing equipment. The remainder was purchased from Mil- [fol. 625] waukee Solvay Coke Company, now a wholly owned subsidiary of Milwaukee.

Milwaukee is under the jurisdiction of the Public Service Commission of Wisconsin which has broad regulatory powers, including jurisdiction over the fixing of rates and charges, and the issuance of securities.

The outstanding securities of Milwaukee consist of the following:

First Mortgage Bonds,	
4-½% Series, due 1967	$13,334,000
7% Cumulative Preferred Stock	$ 2,000,000
Common Stock $12 par	1,112,828 shares

The bonds, preferred stock, and 5,608 shares of common stock are held by the public. The remaining common stock (99.5%) is owned by American.

The company's revenues from gas operations for the 12 months ended April 30, 1947, were $8,733,901. Its gross income, after taxes and operating expenses but before charges for debt, was $977,334. The net balance available for common stock was $185,098.

Its utility plant, at original cost, was stated on April 30, 1947, at $32,533,321, with a depreciation reserve of $9,035,452, or 27.7% of utility plant. Other investments, including its non-consolidated subsidiary Milwaukee Solvay, were carried at $4,354,337. The earned surplus balance, as of the same date, was $1,158,752.

c. Milwaukee Solvay Coke Co.

Milwaukee Solvay is a Wisconsin corporation and a non-utility company operating in the City of Milwaukee. It manufactures and sells coke and coke by-products, and furnishes Milwaukee with a substantial portion of its requirements of manufactured gas. It is expected that when natural gas is introduced into Milwaukee, Milwaukee Solvay will continue in business but will reduce its supplies to Milwaukee to a stand-by basis and for peak-shaving. This Commission has previously approved acquisition of Mil-

[fol. 626] waukee Solvay by Milwaukee.[6] All of the outstanding securities, consisting solely of common stock, are held by Milwaukee.

Milwaukee Solvay carries its fixed plant at cost of $9,315,238, with a depreciation reserve of $7,496,369. Total operating revenue for the 12 months ended April 30, 1947, was $9,019,272. Its net income, after taxes and expenses for that period, was $541,818. As of April 30, 1947, its earned surplus was $1,086,153.

d. Madison Gas & Electric Co.

Madison, a Wisconsin corporation, is a combined electric and gas utility company engaged in the production, distribution and sale of electricity and manufactured gas in Madison, Wisconsin and adjacent territory. For the 12 months ended April 30, 1947, its gross revenues from its electric department aggregated $2,647,675 and gross revenues from its gas department aggregated $1,092,876, or 70.8% and 29.2%, respectively, of the company's total operating revenues.

The outstanding securities of Madison consist of $4,500,000, principal amount, 2-½% First Mortgage Bonds, 1976 Series, all publicly held; and 276,805 shares of common stock having a par value of $16 per share, all of which is owned by American. Its earned surplus at April 30, 1947, was $820,326, of which $676,084 was restricted against use for the payment of cash dividends.

The utility plant at original cost on April 30, 1947, was stated at $12,838,040, with a reserve for depreciation of $3,973,106 or 30.9% of utility plant. The company's net income for the 12 months ended April 30, 1947, after taxes and other deductions, was $577,433.

e. Michigan-Wisconsin Pipe Line Company.

Michigan-Wisconsin, a Delaware corporation, was organized in 1945 for the purpose of constructing and operat-
[fol. 627] ing a natural gas pipe line extending from Texas to Michigan and Wisconsin. It is a non-utility company. At the close of the hearings herein, its outstanding capital

[6] The United Light and Power Company, — S.E.C. — (1946), Holding Company Act Release No. 7023.

[7] The United Light and Power Company, — S.E.C. — (1945), Holding Company Act Release No. 6249.

stock consisted of 3,150 shares of $100 par value common stock, all of which is owned by American.[8] Construction of the pipe line had not yet commenced as of the close of the hearings, although contracts for raw materials, construction and engineering, and gas supply had been entered into.

f. Austin Field Pipe Line Company.

Austin Field Pipe Line Company is a Michigan corporation organized for the purpose of constructing a pipe line extending from the Austin storage field in Michigan to Detroit and connecting certain of Michigan Consolidated's distribution systems with the Austin field. When constructed, the line will be temporarily operated under lease by Michigan Consolidated and later acquired by Michigan-Wisconsin. It is a non-utility company. To date Austin Field Pipe Line Company has issued only 25 shares of capital stock, all of which are owned by the incorporators. Additional stock will be acquired by Michigan Consolidated.

Prior Proceedings

Proceedings pursuant to Section 11 (b) (1) and Section 11 (b) (2) of the Act were instituted by this Commission on March 8, 1940, and December 6, 1940, respectively, to determine what action must be taken by the companies in the United Light and Power holding company system to comply with the provisions of Section 11 (b). The two proceedings were subsequently consolidated.

On March 20, 1941, an order was entered under Section 11 (b) (2) requiring the liquidation and dissolution of The United Light and Power Company to comply with the

[8] This represents the investment required to finance the prosecution of applications for approval of the project and the cost of preliminary engineering studies. See The United Light and Power Co., — S.E.C. — (1945), Holding Company Act Release No. 5869, and — S.E.C. — (1946), Holding Company Act Release No. 6905. We have also recently approved an additional investment by American of $4,000,000 to finance initial construction. See The United Light and Railways Company, — S.E.C. — (1947), Holding Company Act Release No. 7856.

[fol. 628] "great-grandfather" clause of that section.[9] Further hearings to determine what additional steps should be taken under Section 11 (b) (2) were adjourned subject to call. The prior hearings have been consolidated into the proceedings on the present plan.

On August 5, 1941, the Commission entered an order under Section 11 (b) (1), relating to geographic integration. Railways, having indicated its preference for Continental Gas as its principal integrated system with Kansas City Power & Light Company and related properties as a base, the Commission concluded that Railways was required to confine its operations to Kansas and Missouri and states, under Section 11 (b) (1), relating to geographic integration, which adjoin those states, and ordered Railways to dispose of various properties, including its interest in American and its subsidiaries. American, in turn, having indicated that it desired to retain Michigan Consolidated as the base of its principal integrated system, was directed to dispose of its interest in all properties located outside Michigan or states which adjoin Michigan, and also to dispose of its investment in Detroit Edison. The United Light and Power Company, 9 S.E.C. 833.

In accordance with the Order of August 5, 1941, both Railways and American have disposed of certain scattered properties. However, Railways has not yet disposed of its interest in American and its subsidiaries, nor has American disposed of its investment in Detroit Edison. In addition, the question is still open whether the remaining properties constitute integrated systems and other businesses which are retainable under Section 11 (b) (1). One of the premises of the present plan is that Michigan Consolidated and Milwaukee will form such an integrated system which could be retained by American.

On October 1, 1944, Railways and American filed a plan under Section 11 (e), known as Application No. 21. This [fol. 629] plan provided for the liquidation and dissolu-

[9] The United Light and Power Company, 8 S.E.C. 837 (1941). Power was subsequently liquidated and dissolved pursuant to a Section 11 (e) plan filed by the company, 13 S.E.C. 1 (1943), plan approved and enforced, 51 F. Supp. 217 (D. Del. 1948), affirmed sub nom. Otis & Co. v. S.E.C., 142 F. 2d 411 (C.C.A. 3, 1943), 323 U.S. 624 (1945).

tion of American and for the disposition by Railways of all securities received by it in such liquidation. Under the plan, American's preferred stock was to be retired by a cash payment equivalent to the liquidation price of $25 a share, plus accrued dividends. Remaining portfolio securities were to be distributed pro rata to common stockholders. Opposition to the plan was vigorously voiced by Allied Chemical & Dye Corporation ("Allied"), which took the position that preferred stockholders were entitled to receive approximately $40 a share, which they contended represented the "fair investment value" of their stock. The Commission's Findings and Opinion with respect to this plan were issued on April 30, 1946.[10] A majority of the Commission, Commissioners Healy and Caffrey dissenting, found the plan to be unfair in its treatment of the preferred stockholders and stated that unless the plan were amended to provide for the payment of $33 per share to the preferred stockholders, an order of disapproval would be entered. However, prior to the entry of any final order with respect to this plan, a change in the membership of the Commission occurred and, at the request of the company, a reargument on the plan was held on August 6, 1946.[11] Before any decision was rendered on reargument, Commissioner Healy died and no subsequent decision had been rendered on Application No. 21 prior to the filing of the present plan, contained in Application No. 31, which is stated to be in lieu of the liquidation plan contained in Application No. 21.

As part of the present plan, it is proposed to construct an interstate natural gas pipe line which applicants assert will join two of the operating subsidiaries of American into an integrated gas utility system and justify the continued existence of American. In 1945 and 1946 we permitted American to make small investments in the proposed pipe line project to finance the prosecution of applications [fol. 630] for regulatory approvals to construct the line.[12]

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[10] The United Light and Power Company, ——S.E.C.—— (1946) Holding Company Act Release No. 6603.

[11] The United Light and Power Company, ——S.E.C.—— (1946), Holding Company Act Release No. 6750.

[12] The United Light and Power Company, ——S.E.C.—— (1945), and ——S.E.C.—— (1946), Holding Company Act Releases Nos. 5869 and 6905.

On November 19, 1947, we approved an additional investment of $4,000,000 as necessary to permit construction of the line to begin and fulfill a condition in the Certificate of Convenience and Necessity of the Federal Power Commission requiring such construction to commence not later than January 1, 1948, and thus to avoid any possibility that the Certificate might be forfeited merely by the lapse of time.[13]

The Plan

Application No. 31, as modified by the Second Amendment dated October 28, 1947, contains the following proposals:

1. American will continue in existence as a registered holding company over (a) Michigan Consolidated, (b) Milwaukee, (c) Milwaukee Solvay, (d) Michigan-Wisconsin, (e) Austin, and (f) any additional properties which may hereafter be lawfully acquired. These properties are asserted to *constitute* an integrated gas utility system and related "other businesses" which are retainable under the Act.

2. During the year 1948, American, in lieu of cash dividends on its common stock, will pay quarterly dividends of one share of Detroit Edison stock for each 75 shares of American. During the same period (and for the last quarter of 1947, if possible) Railways, in lieu of cash dividends to its common stockholders, will pay quarterly dividends of one share of American common for each 50 shares of Railways.[14]

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[13] The United Light and Power Company, ——S.E.C.—— (1947), Holding Company Act Release No. 7856, rehearing denied, Holding Company Act Release No. 7887.

[14] This alteration from 1 share for each 55 shares held, as originally provided in the plan, was made during the hearings. At oral argument, it was further modified by applicants' counsel by a statement that the dividend is intended to be on a basis equivalent to about $1.45 a share annually, so that if the market for American common should decline, a cash dividend would be declared to supplement

[fol. 631] 3. The resources and credit of American will be used to provide the common stock equity for the proposed pipe line system. Thus, the common stock of Michigan-Wisconsin and Austin will be acquired and retained in the American system using (a) cash now on hand, (b) cash accumulated from the discontinuance of cash dividends on common stock, and (3) cash obtained from the sale of shares of Detroit Edison. Most of the senior securities of Michigan-Wisconsin and Austin will be sold to the public. The cash to be supplied by the system will be provided as follows:

(a) American will proceed immediately to sell 450,000 shares of common stock of Detroit Edison. In connection with such sale, American may purchase on the New York Stock Exchange a limited number of shares of Detroit Edison for stabilization purposes during the offering.[15] During 1948 American will apply for permission to sell such additional shares of Detroit Edison as are needed to complete its investment in Michigan-Wisconsin.

(b) From time to time, as funds are needed for construction of the pipe line, Michigan-Wisconsin will issue and sell to American, up to 250,000 shares of its common stock for cash at par value of $100 per share.[16]

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the stock dividend to the extent necessary to approximate that amount.

A similar statement was made with reference to the dividending of Detroit Edison to American common stockholders, so that the quarterly distribution would be on a basis equivalent to approximately $1.20 per share annually.

[15] This transaction has already been approved, subject to reservations of jurisdiction over the terms and conditions of the sale. The United Light and Railways Company, — S. E. C. — (1947), Holding Company Act Release No. 7856.

[16] As indicated above, we have already approved the issuance and sale of 40,000 shares and the acquisition thereof by American in order to permit commencement of construction of the pipe line and thus avoid a forfeiture, through the lapse of time, of the Certificate of Convenience and Necessity. See The United Light and Railways Company, — S. E. C. — (1947), Holding Company Act Release No. 7856.

(c) Michigan Consolidated will issue and sell 285,714 shares of its common stock to American for cash at par of $14 per share.

(d) Michigan Consolidated will acquire for cash the 25 [fol. 632] shares of Austin now outstanding at par of $100 per share and will also acquire for cash 29,975 additional shares to be issued and sold by Austin.

(e) From time to time, as funds are needed for construction of the pipe line, Austin shall have authority to borrow up to $6,500,000 on promissory notes and Michigan Consolidated is to be authorized to purchase these notes, in accordance with the terms of a Credit Agreement filed in the record herein.

4. All of American's holdings of Detroit Edison will be disposed of prior to December 31, 1948. Those shares not used or withheld for dividend distribution or sold to provide funds, will be distributed pro rata to American's common stockholders after expiration of the offer to its preferred shareholders pursuant to paragraph 5 below.

5. American shall purchase at $33 per share (plus an amount equal to unpaid accrued dividends) all shares of its preferred stock tendered to it for sale at that price within the 30-day period immediately following the date the offer to purchase becomes effective. The offer to purchase shall become effective on a date to be fixed by American, "which date shall be as early as practicable after the Commission's order approving the plan and authorizing the purchase of such stock has been entered and in any event not later than 15 days after said order shall no longer be subject to judicial review." Railways will tender its holdings of American's preferred stock in accordance with this offer.

6. To provide cash to purchase its preferred shares, American will borrow up to $15,000,000 on 10-year serial notes.

7. As soon as possible after the offering to American's preferred stockholders becomes effective, the common stock of Madison will be distributed pro rata to the common stockholders of American.

8. Prior to December 31, 1948, Railways shall dispose of all shares of preferred and common stock of American held

by it and all shares of Detroit Edison and Madison received by it in distribution from American by the following steps:

[fol. 633] (a) As soon as practicable after the plan has been approved and the prior preference stock of Railways has been called for redemption, Railways will offer its common stockholders the right to purchase shares of American common at $12 per share (or such lower price as may be fixed by the Board of Directors) on the basis of 1 share of American for each 5 shares of Railways. A second offering on the same basis will be made during the latter part of 1948.

(b) Cash accumulated by Railways as a result of paying dividends in kind, from the sale of preferred and common stock of American, and from the sale of shares of Detroit Edison and Madison, will be applied to the reduction of Railways' outstanding $25,000,000 bank loan.

9. As soon as practicable after approval of the plan, Railways will borrow $28,500,000 on 15-year serial notes. The proceeds will be used to redeem, at the call price thereof, all of Railways' outstanding prior preference stock, and to invest an additional $9,000,000 in the common stock of Continental Gas. Continental Gas will use that money to pay its outstanding bank loans, which will aggregate $8,946,700 principal amount on January 2, 1948.

10. No fractional shares or scrip will be issued in any stock distributions under the plan. The determination of the cash amount to be paid in lieu of fractional shares will be subject to review by the Commission at least 10 days prior to the date of distribution.

11. At or prior to the time the second rights offering of American common is made to Railways common stockholders, all interlocking of officers and directors and all contractual relations between the American system and the Railways will be terminated.

12. Separate applications will be filed covering the senior financing of Michigan-Wisconsin.

13. The plan contains a request for lifting the restriction on Railways common dividends contained in the Commission's order of November 28, 1945 (Holding Company Act Release No. 6249).

14. The Commission is to reserve jurisdiction to extend [fol. 634] the time within which any transaction contemplated by the plan is to be completed and to authorize any other changes necessary to insure expeditious consummation of the plan in a feasible manner.

15. Fees and expenses in connection with the plan will be subject to the jurisdiction of the Commission and applicants will pay such fees and expenses as are awarded and determined by the Commission.

The plan contains no request for court enforcement.

Statutory Standards

In order to approve a plan under Section 11 (e) of the Act, we must find that it is (a) "necessary to effectuate the provisions of subsection (b)" of Section 11, and (b) "fair and equitable to the persons affected by such plan." We must also examine the various transactions proposed in the plan to determine whether such transactions comply with other applicable provisions of the Act.

A. Necessity

We have consistently construed the "necessity" standard of Section 11 (e) as permitting approval of a plan which provides an appropriate means for achieving results required by the statute, although it might not be the only plan capable of effectuating such results.[17] The present plan is proposed as a means for bringing American and Railways into compliance with an outstanding order of this Commission issued on August 5, 1941, and for advancing compliance, in other respects, with the provisions of Section 11 (b). It differs from the usual plan requiring us to review the status and relationships of companies already in existence, by asking us to assume the system as it will be when the proposed pipe line project, now in its early stages of construction, will be completed and in operation.

The pipe line project was first referred to in these proceedings sometime in 1944 when, in connection with the plan

[17] This construction of the Act has been sustained by the courts, Commonwealth & Southern Corporation v. S. E. C., 134 F. 2d 747 (C. C. A. 3d, 1943); Lahti v. New England Power Association, 160 F. 2d 845 (C. C. A. 1st, 1947).

[fol. 635] of liquidation contained in Application No. 21, it was indicated that American proposed to prosecute applications before the Federal Power Commission and various regulatory agencies for authority to construct an interstate natural gas pipe line to tie in with its northern subsidiaries. Because of the pendency of the liquidation plan it was deemed inappropriate for American to prosecute those applications, and a separate company, Michigan-Wisconsin Pipe Line Company, was formed for that purpose. We approved an initial investment by American of $5,000 in that company in 1945,[18] and a year later, approved an additional investment of $310,000.[19] In passing on these matters, as well as in other related opinions issued during that period, we expressly stated that the pipe line project, which was still in its initial stages, should not be permitted to interfere with the rapid liquidation of American or with expeditious compliance by Railways and American with our order of August 5, 1941. These statements were based on our desire to achieve compliance with Section 11 (b) with all due expedition. The Section 11 (e) plan which American had voluntrailly filed for the purpose was a liquidation plan. That plan made no provision for integrating the gas properties by means of a pipe line. On the contrary, American contemplated at that time that if the line were ultimately to be constructed, Michigan-Wisconsin would either become an independent company or a subsidiary of Michigan Consolidated, serving communities in Wisconsin by contract. Under the circumstances then existing, we found that the immediate liquidation of American would afford an appropriate means of compliance with the Act and we felt that the pipe line should not be permitted in any way to hinder or delay such compliance.

The reasons for the delay in consummation of the liquidation plan have been stated earlier in this Opinion. In the interim, the Federal Power Commission completed its proceedings on the pipe line and granted a certificate to Michigan-Wisconsin on November 30, 1946. This action, of course, represented a material change in the situation; the pipe line

[18] The United Light and Power Company, — S. E. C. — (1945), Holding Company Act, Release No. 5869.

[19] The United Light and Power Company, — S. E. C. — (1946), Holding Company Act, Release No. 6905.

[fol. 636] came that much closer to being a reality. In the light of this change and in view of the fact that no definitive action had been taken on the liquidation plan, we believe that applicants were justified in modifying their proposals and submitting to us a new plan for compliance with the statute. Section 11 (e) clearly places the initiative in such matters with the company. The filing of a plan does not irrevocably commit a company to the method of compliance then proposed should it decide, in the light of altered circumstances or upon reconsideration, that the interests of its security holders would be better served by a different plan which would also achieve expeditious compliance with the Act.

The Pipe Line

It is contended that the proposed pipe line will serve as a means of integrating Michigan Consolidated and Milwaukee and will render the continued existence of American over these subsidiaries and the pipe line consistent with the standards of Section 11 (b) (1). If this contention is sound, the pipe line and the transactions incidental thereto may be regarded as providing an appropriate means of complying with Section 11 (b) which would satisfy the "necessity" standard of Section 11 (e). We must, therefore, consider whether the pipe line will in fact result in the integration of Michigan Consolidated and Milwaukee and whether retention by American of the pipe line and such subsidiaries will constitute a step in compliance with Section 11 (b) (1). In that consideration we are not called upon nor do we have the power to determine the merits of the pipe line as such, for that matter is wholly within the jurisdiction of the Federal Power Commission and has already been decided in the affirmative.

Section 11 (b) (1), in so far as here relevant, requires the operations of a holding company system to be confined "to a single integrated public utility system," and "to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operation of such integrated public utility system." Section 2 (a) (29) (B), in defining an integrated gas utility system, refers to the factors of substantial economies, localized management, efficient operation and effectiveness of regulation. Accord-
[fol. 637] ingly, in determining whether the pipe line will advance compliance with Section 11 (b) (1), it is necessary

to consider at length, against the background of the statutory requirements of Sections 11 (b) (1) and 2 (a) (29) (B), the relationship of the proposed pipe line to the operating subsidiaries which it is intended to integrate and the limits of the proposed project. We shall, of necessity, rely on many of the findings made by the Federal Power Commission in its determination that construction of the pipe line is a matter of "public convenience and necessity" although, as the discussion will indicate more fully, there have been some changes in the situation since those findings were entered and the authorization itself does not yet extend to the complete project which has been presented to us.

Gas Supplies

It has been contended that the gas supply situation of Michigan Consolidated and Milwaukee urgently requires that some additional source of supply, such as the proposed pipe line, be provided. This contention is relevant, not only in connection with the issue of substantial economies and efficient operation, but also in connection with the question whether the pipe line itself can be considered as a related and reasonably incidental business to what is asserted will be an integrated gas utility system.

Natural gas has been distributed in the Detroit area since 1936. Gas is presently obtained by Michigan Consolidated from Panhandle under a contract entered into in 1935. Panhandle is a "natural-gas company" within the meaning of the Natural Gas Act and is subject to the jurisdiction of the Federal Power Commission. It produces and purchases natural gas in the states of Texas, Oklahoma and Kansas and owns and operates a transmission pipe line system extending from *thoses* states through portions of Missouri, Illinois, Indiana, Ohio and Michigan. Panhandle's contract with Michigan Consolidated has been amended from time to time to provide for increased deliveries. At the present time it provides for a maximum delivery of 125,000 Mcf. per day. This contract expires on December 31, 1951.

By separate contract, Panhandle delivers gas to Michigan Consolidated for distribution in the Ann Arbor area. [fol. 638] Ann Arbor also received natural gas produced in Michigan. Under the terms of the contract with Panhandle, up to 25 per cent of Ann Arbor's requirements may be met with Michigan gas, and Panhandle is to deliver a daily

maximum of 2,000 Mcf. from its lines. This contract also expires on December 31, 1951.

The communities in western Michigan served by Michigan Consolidated, with the exception of Ludington which uses manufactured gas, obtain their supply from natural-gas fields in Michigan. Michigan Consolidated owns 148 gas wells and has gas rights on other lands in west central Michigan, known as the Austin and Reed fields. It purchases gas produced in other Michigan fields. In 1941 we approved the acquisition by Michigan Consolidated of the Austin field which is located in Mecosta County, Michigan.[20] Commercial production in that field commenced in 1934. The recoverable gas in the field has been limited and the heavy demands of the war years have accelerated the rapid depletion of the field. During 1946, Michigan Consolidated purchased 3,494,263,700 cubic feet of natural gas and produced from its own wells 3,009,230,200 cubic feet, for distribution in the western communities. An additional supply of natural gas is essential to continuance of service to those communities.

There has been a rapidly expanding demand for gas in the heavily industrialized area served by Michigan Consolidated. Restrictions on construction of new facilities during the war, the limited availability of materials since the termination of hostilities, and the heavy gas demand in other regions served by Panhandle, have made it impossible for Panhandle to keep pace with the growth of the Detroit market. As a result, that area suffers from an acute shortage of natural gas at the present time and Michigan Consolidated has been compelled during peak periods to supplement its receipts from Panhandle with manufactured gas at greatly increase- expense. It has also been necessary to discontinue gas service to certain industrial customers in Detroit during brief periods of extraordinary demand, to suspend acceptance of additional space heating customers, and to restrict the amount of additional gas sold to industrial customers.

[fol. 639] . During the period 1941-1946, Michigan Consolidated took 67% *per cent* of the volume of gas available under its contracts with Panhandle. This figure, of course, represents a leveli g off of the peak and slack periods.

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[20] Michigan Consolidated Gas Company, 8 S.E.C. 550 (1941).

During 1946, Michigan Consolidated paid Panhandle an average of 21.1 cents per thousand cubic feet of natural gas purchased.[21] However, during the same year, the company manufactured 1,254,300 Mcf. in its manufacturing plants to meet its peak demands in supplementation of the supply received from Panhandle. The send-out of Michigan Consolidated in the Detroit area exceeded the 125,000 Mcf. provided by the Panhandle contract on 5 days in 1942, 14 days in 1943, 13 days in 1944, 32 days in 1945, 97 days in 1946 and 108 days in the first four months of 1947, demonstrating vividly the growing shortage. Panhandle has not limited the company to the contract maximum of 125,000 Mcf. when it had additional gas available to meet Michigan Consolidated's demand. For example, the maximum day's send-out of the company in the Detroit area occurred on January 21, 1947, and amounted to 216,638 Mcf.; of that amount, Panhandle supplied 127,529 Mcf. On the other hand, there have been occasions on certain days in December, 1946, and in January and February, 1947, when Panhandle was compelled to curtail its supply to Michigan Consolidated and deliver less than the quantities called for by the contracts.[22] In 1946 the send-out exceeded Panhandle's deliveries by 1,191,271 Mcf., which was made up by the manufacture of 1,187,775 Mcf. and by the use of 3,496 Mcf. taken from gas holders.

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[21] Under the current rate schedule in force since November 2, 1945, the company pays 18.5 cents per cubic foot for "base load" gas, and 26 cents per cubic foot for gas in excess of the base load. The base load is determined by the quantity of gas purchased over a determinable prior period. The rate schedule also fixes 16.5 cents per cubic foot for interruptable gas, but no gas has ever been made available to Michigan Consolidated at that rate.

[22] As a consequence of that curtailment and its own inability to obtain materials to manufacture sufficient substitute gas, Michigan Consolidated was compelled to discontinue gas service to its largest industrial consumers in Detroit for the period from 4:00 P. M. Friday, February 7, 1947, to midnight Monday, February 10, 1947. During the winter season 1946-1947, the Detroit area received 120,833 Mcf. during periods of maximum curtailment, in accordance with voluntary arrangements between the companies approved by the Federal Power Commission.

Michigan Consolidated has plants in Detroit, Grand Rap- [fol. 640] ids, Ann Arbor and Muskegon equipped to produce carburetted water gas, which resembles natural gas in quality and can be used as a temporary substitute for, or in simultaneous distribution with, natural gas. In Detroit, the company has recently installed a new liquified petroleum gas manufacturing plant. These facilities are insufficient to supply the full gas demands of the system and are used only for standby purposes to level peak demands or in case of temporary curtailment or failure of the natural gas supply. The applicants have estimated that the average cost of manufacturing 1,254,300 Mcf. in these plants in 1946 was $1.52 per Mcf., such cost including the direct cost of manufacturing and the expense incurred in maintaining the plants in stand-by condition ready for emergency use. For 1947, it was estimated that 4,372,000 Mcf. of manufactured gas would be required, based on six months actual and six months estimated, at a somewhat lower cost.[23]

The gas supply situation of the Wisconsin companies is somewhat different but also indicates an urgent need for new sources of supply. Both Milwaukee and Madison use only manufactured gas. At the present time no natural gas enters the State of Wisconsin, except for a small region near the southern boundary of the state in the area of Lake Geneva and Burlington, served by Wisconsin Southern Gas Company, a non-affiliated company. This company obtains natural gas from Natural Gas Pipeline Company of America whose transmission line terminates near the Wisconsin boundary. Applications to extend service into Wisconsin have been made in the past by various companies, including Natural Gas Pipeline Company of America and Northern

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[23] The lower cost is not contained in our record. According to the order of the FPC granting a Certificate of Convenience and Necessity to the Austin Field line (Docket No. G-834, dated November 13, 1947), "the costs of manufacturing approximately 4,000,000 M*fc*. of equivalent Btu gas, required to meet Michigan Consolidated's firm requirements during the 1946-47 winter approximated $1.29 per Mcf. and applicants' witnesses estimate the cost will rise to approximately $1.35 per Mcf. during the 1947-48 winter." (at mimeo. p. 7). The lower cost is attributed to higher efficiency by reason of experience gained in 1946.

Natural Gas Company, but such applications have been withdrawn.[24] The record indicates that Milwaukee has been [fol. 641] unable to earn its allowable return and that, as a consequence of the rapidly increasing expense of manufacturing gas, it has been compelled twice in the past year to apply to the State Commission for an increase in rates. In May an increase of $575,000 a year was allowed. The second application requests an additional $1,000,000 a year. In addition, demand in Milwaukee has increased to a point where either additional manufacturing facilities must be installed to maintain service or some other sources of supply must be provided.

The Proposed Pipe Line Project

As has been indicated, on November 30, 1946, the Federal Power Commission granted a Certificate of Convenience and Necessity to Michigan-Wisconsin to construct and operate a natural gas pipe line from the Hugoton gas fields in Texas to points in Michigan and Wisconsin. A second certificate was granted on November 13, 1947, to Austin to operate the Austin Field and to build a line from that field to Detroit and other points in Michigan.

The main pipe line to be constructed by Michigan-Wisconsin will be a 24 inch line[25] from a point in Hansford

[24] Earlier, before amendment of the Natural Gas Act giving the Federal Power Commission jurisdiction over such matters, Western Gas Company and Independent Natural Gas Company applied to the Wisconsin Public Service Commission for authority to bring natural gas into the state. Such a certificate was granted to Independent Natural Gas Company, but no line was ever constructed under the certificate.

[25] As initially designed and approved by the Federal Power Commission, it was proposed that this be a 26 inch line. However, the inability to obtain 26 inch pipe has necessitated redesigning the line to use 24 inch pipe of greater thickness. By using higher pressure, it appears that the capacity of the line will be unaffected or may even be increased. It has been asserted by certain of the participants opposing the plan that this change nullifies the FPC certificate of November 30, 1946, granted to Michigan-Wisconsin. We cannot, of course, decide that matter, but

County, Texas, extending for 810 miles in a northeasterly direction through Oklahoma, Kansas, Missouri, Iowa and Illinois, to a point near Millbrook, Illinois, referred to as "Wisconsin Junction." From that point a 22 inch line [fol. 642] will extend 259 miles through Indiana and Michigan to the Austin Field, where the line will terminate. From Wisconsin Junction, another 22 inch line will extend 101 miles to a point near Milwaukee referred to as "Milwaukee Junction." An 18 inch line will extend from there to the Milwaukee area, and a 14 inch line will extend 59 miles to a point near Appleton. Branches from the 14 inch line will extend to Sheboygan, Fond du Lac, Oshkosh, Manitowoc, Two Rivers, Appleton and Green Bay. A 12 inch branch line will extend from Milwaukee Junction to Racine, and a 10 inch line to Madison. The latter line will have laterals extending to Janesville, Beloit and Stoughton, Wisconsin. The branch lines serving Wisconsin will total 422 miles. As the main line passes through Missouri, service will be made to Maryville, and in Iowa, a lateral line will be extended to Mt. Pleasant, Burlington, Ft. Madison and Keokuk.

At the Austin and Reed City gas storage fields, Austin will install additional wells and gathering lines, and will construct a 24 inch line approximately 140 miles long connecting the Austin storage field with Michigan Consolidated's distribution system in the Detroit area. A branch line of approximately 25 miles will connect the Austin-Detroit Line with Ann Arbor.

As has been indicated, the Austin field project was authorized by the Federal Power Commission on November 13, 1947. Construction of the Austin-Detroit line is to start immediately, with completion expected by April 1, 1948. Initially, the line will be used for transporting to and from the storage fields gas delivered from Panhandle to Michigan Consolidated, the contracting parties having recently agreed

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we do note that the specific question of the redesigned line was before the FPC when it more recently granted the Austin Certificate and the alteration was not considered material. (FPC Docket No. G-834, November 13, 1947, at mimeo. p. 9). Unless and until the FPC rules otherwise on the Michigan-Wisconsin line, we do not regard this change in design as material to the issues presently before us for decision.

to such storage, which will enable Michigan Consolidated to build up reserves for the winters of 1948-1949 and 1949-1950, before the Michigan-Wisconsin line goes into operation. During this period, the Austin facilities will be leased to Michigan Consolidated. When the main line of Michigan-Wisconsin reaches the Austin field and is connected thereto, which is expected to be some time towards the end of 1949, Michigan-Wisconsin will take over the lease and operation of the Austin facilities. It is expected that natu- [fol. 643] ral gas from the main line will enter the Detroit area by January 1, 1950.[26] Prior to December 31, 1951, Michigan-Wisconsin will acquire the Austin facilities for a purchase price equal to the cost of the properties less depreciation.

According to the forecast of gas sales contained in the record, the sales in 1950, the first year of operation, will total 46,716,000 Mcf. This will be increased, by the installation of additional compressor equipment, to 74,653,000 Mcf. in 1951 and to 108,762,000 Mcf., the designed capacity of the line, in 1952, which will be the first year of full operation. The underground storage fields will permit the line to be operated at full capacity all of the time, the amounts not immediately consumed during slack periods being directed into storage and available to meet peak demands. It is estimated that during peak periods, the maximum daily requirements of the Wisconsin, Iowa and Missouri markets will be 205,000 Mcf.; the balance will flow into Michigan. Michigan, in addition, will require the withdrawal of about 299,000 Mcf. per day from storage. Practically the entire peak demands of Detroit, Ann Arbor and Mt. Pleasant will be met from storage. The capacity of the storage fields is estimated at 37 billion cubic feet, or enough to meet peak requirements for an uninterrupted period of approximately one hundred days.[27] Through storage of gas during slack periods and

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[26] Natural gas from the line is expected in the Milwaukee area by July 1950. The delay will be due, in part, to the need for converting burner equipment and fixtures to handle the richer natural gas.

[27] These figures assume that Panhandle will continue to supply 32,000,000 Mcf. annually, in accordance with the condition in the FPC certificate preserving to Panhandle its current interest in the Detroit market and a share of the

withdrawal during periods of heavy demand, the maximum capacity of the facilities for limited peak periods can attain 630,000 Mcf. daily or double the designed capacity of the main transmission line.

[fol. 644] Applicants have estimated the total cost of constructing the line at $104,530,800, including $9,394,500 for the Austin-Detroit line and branches. This estimate, by the engineering firm of Ford, Bacon & Davis, was made as of September 10, 1947, and represents a revision of an earlier estimate of $85,593,573 submitted to the Federal Power Commission. The upward revision was due to the increase in prices and costs which occurred since the earlier estimate. However, even this figure is not final, for the cost of nearly every item is subject to change. For example, the basic item of pipe, which accounts for over one-fourth of the total cost of the project, has been contracted for on a "cost-plus" basis, the price of the pipe depending on the current market price of scrap and pig. Thus, the September 10, 1947, estimate is based on a cost of pipe of $135 per ton, a figure already rendered obsolete by the continued rise in raw material prices. Similarly, the compressors which form another major item are subject to price changes before the delivery date. The cost of the project will also be affected by any changes in railway freight rates and labor costs. It is therefore impossible to know at this time what the total cost of the completed line will be. It is clear from the record that, on the basis of present prices, the estimate of $104,530,800, made on September 10, is too low in view of the price trend since that date. Whether the ultimate cost of the line will be greater or lower than the estimate will, of course,

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growth. A fifteen-year contract for this amount has been tendered Panhandle by Michigan Consolidated, but no agreement has been reached. If this gas is not made available, the new line will be inadequate to supply the full requirements of Michigan Consolidated.

A witness for objecting common stockholders expressed the opinion that the capacity of the storage fields was only 12.7 billion cubic feet. We do not think it is necessary to resolve this conflict in evidence since the FPC has already determined that the pipe line project is a feasible one and that the use of the storage fields will result in increased efficiency and economies.

depend upon whether prices continue to advance, recede or are stabilized at approximately their present levels.

Uncertainty over the ultimate cost of the project also makes it impossible to know at this time what rate the new line will charge its customers for gas. In the Federal Power Commission proceedings, Michigan-Wisconsin estimated its average rate for gas at 17.71 cents per Mcf. delivered at the city gate. This rate was considered by the Power Commission in its opinion, but was not taken as final. The opinion of the Power Commission states that the rate question should receive further study, and operation of the pipe line under the certificate is expressly conditioned upon the filing of a satisfactory rate schedule with that Commission. No rate schedule has been filed to date. However, it would appear that the increase in construction costs which has al- [fol. 645] ready occurred will require a rate higher than the one previously considered. On the basis of a cost of $104,500,000, the average rate is now estimafed at 21 cents per Mcf., and the rate will have to be increased proportionately with the cost of constructing the line.[28] Contracts between Michigan-Wisconsin and Michigan Consolidated and Milwaukee to deliver at the 17.71 cents rate will have to be revised once a new rate schedule has been submitted.

Michigan-Wisconsin has entered into a gas supply contract with the Phillips Petroleum Company to supply the natural gas for the line. Pursuant to the contract, Phillips has dedicated a total of 633,460 acres in the Hugoton field. The Federal Power Commission, in its opinion accompanying the certificate, considered at length whether this assured applicant a sufficient supply of gas to support its project and con-

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[28] Depreciation on the line has been computed on a 33 year life basis (3%), derived from the estimated useful life of the pipe line. Objectors contend that the depreciation rate should be computed on the basis of estimated life of gas reserves which they contend to be shorter, thus requiring a higher annual depreciation rate. This, like the entire question of rates, is a matter for the FPC and we do not here decide which method is proper. For our purposes we have used applicants' figure since that is the one appearing in the FPC findings authorizing the certificate. See Michigan-Wisconsin Pipe Line Company, Docket No. G-669, FPC Opinion No. 147, at mimeo. p. 34.

cluded that it was "adequate to supply and support the facilities which we find should be authorized." [29] Since that time, three of the Phillips subcontractors, with approximately 25 per cent of the dedicated acreage, have notified Phillips that they have cancelled their contracts under a condition in the contract which, they have asserted, gave them the right of cancellation if the Federal Power Commission failed to issue a certificate within a specified time. Phillips has notified them that the conditions under which the contract might be cancelled did not exist. The issue is now in *ligation.* If the subcontractors are successful, it will be necessary for Michigan-Wisconsin to renegotiate those contracts or to seek gas supplies elsewhere. Testimony in the record raises serious doubt whether any further acreage is available in the Hugoton fields.

The order of the Federal Power Commission authorizing [fol. 646] the Michigan-Wisconsin certificate has been appealed from by Panhandle, and is now under review in the Court of Appeals for the District of Columbia.[30]

Objectors to the plan assert that the pipe line as presently proposed varies so greatly from the project approved by the Federal Power Commission, that it is improper to assume that applicants' project has been authorized by a certificate. They point to (1) the redesigning of the line for 24 inch pipe in place of 26 inch pipe, (2) the increase in applicants' estimate of construction costs from $85,500,000 to $104,500,000, (3) the necessary revision in basic gas rate from 17.71 cents per Mcf. to at least 21 cents, and (4) the questioning in litigation of approximately 25 per cent of the gas reserves relied on by applicants. They also assert that this Commission should not act until the validity of the certificate has been determined on appeal; that we may not properly consider the project at this time since various conditions in the certificate such as those requiring the filing

[29] FPC Opinion No. 147, at mimeo. p. 27.

[30] On October 10, 1947, Panhandle filed a petition in that proceeding requesting leave to adduce additional evidence before the FPC with respect to the changes in circumstances since the certificate was authorized. The petition has been opposed by the FPC. There is also pending in that proceeding a motion by Michigan-Wisconsin to dismiss the appeal as being without merit.

of rate schedules, securing contracts with consuming utilities and obtaining state regulatory approval have not been fulfilled; and that the Federal Power Commission has not approved the project in the form presented to us since existing certificates do not now authorize the installation of all the compressors required to attain full capacity nor do they now authorize the use of the Austin storage fields and the Austin-Detroit line to store and transmit Michigan-Wisconsin gas. Finally they assert that the evidence adduced by applicants pertaining to cost of construction, operating costs, adequacy of reserves, and earning capacity of the company is without substantial basis and that the estimates of their own witnesses should be accepted. This evidence, they contend, together with the other factors listed above, demonstrate the unfeasibility of the project and require our disapproval of the portions of the plan dependent on the pipe line.

In considering these objections, we observe at the outset [fol. 647] that we have no authority to pass upon or question the validity of the Federal Power Commission certificates. Nor are we in any position to determine whether the project has so changed as no longer to qualify for the existing certificates. The four respects in which it is asserted that there has been a substantial modification in the project have been brought to the specific attention of the Power Commission by a motion for rehearing as well as in a more recent petition filed by Panhandle in the review proceedings to remand the case to the Power Commission. Unless and until the Power Commision alters or rescinds its certificates, or until the certificates have been declared invalid by a competent court, we must assume for our purposes that they are valid and outstanding. Moreover, we note that at least some of the modifications listed above were before the Power Commission when it rendered its decision or since. We have adverted to the knowledge that the line was being redesigned for 24 inch pipe and to the fact that the FPC opinion expressly leaves the question of rates open. The possibility that the line would cost more than estimated was also considered by the Commission:[31] and the adequacy of gas reserves and the

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[31] In this regard, the opinion states:

"Estimates of project costs are predicated largely on quotations from manufacturers of material and equipment.

deadlines imposed by the conditions in the gas supply contracts were also known to the Commission when the certificates were issued.

The Michigan-Wisconsin certificate contains twelve terms and conditions. Several of them relate to reservations of jurisdiction and define the purposes to which the line may be put. Others require applicant to secure state regulatory [fol. 648] approvals, to obtain SEC approval of financing, to enter into certain agreements with Michigan Consolidated and other purchasers, to file rate schedules, to commence construction of the line by January 1, 1948, and preserve to Panhandle a share of the market. Some of these conditions have already been fulfilled, others cannot be until the project is further advanced. None of them has been asserted by anyone in this proceeding to be impossible of fulfillment. Although the Wisconsin Public Service Commission has not yet authorized construction within its state, several Wisconsin communities appeared before the Federal Power Commission in support of the project and their is no reason to believe that the Wisconsin Commission will deny the application when one is made. Under the circumstances, we may assume that the management will take the necessary steps to fulfill the conditions imposed by the certificate.

The present authorizations to Michigan-Wisconsin permit the construction and operation of its line only as far as the Austin storage fields, 140 miles from the principal market in Detroit, while the authorizations to Austin are presently

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Otherwise they represent the judgment of a firm of consulting engineers experienced in pipeline construction and operation as do the estimates with reference to operating expenses.

"It is recognized that the estimates with respect to future project costs and operating expenses in these times of rapidly changing prices and economic conditions are subject to change. Labor costs also are subject to fluctuations. Not only this project, but all future construction and operation will be affected by these changing costs and employment conditions and the Commission recognizes their impact.

"We consider applicants' estimates adequate and reasonable as of the time of preparation and accept them as reasonable and adequate for the purposes of this proceeding." (FPC Opinion No. 147, at mimeo. p. 36.)

limited to the storage and transmission of gas obtained by Michigan Consolidated from Panhandle. Thus the entire project envisioned by applicants has not yet received full authorization and objectors urge this as a serious deficiency. It is clear from a reading of the opinions of the Federal Power Commission, however, that the entire project is before it and that the necessary authorizations are to be sought as the need arises. The certificate to Austin expires on December 31, 1951, when Michigan Consolidated's contract with Panhandle terminates, while the Michigan-Wisconsin certificate is expressly conditioned on the filing of applications which will permit the Austin field and lines to be tied in with its operations. Similarly, the authorizations for installation of compressors are to be sought as they are required for the line.

Applicants' basic exhibit covering the construction costs and initial operating revenues of the pipe line is contained in the Ford, Bacon & Davis "Three Year Operating Forecost" of September 10, 1947. This exhibit was introduced through a witness, Clarence J. Knutson, a senior engineer [fol. 649] of the firm, who assisted in preparing the report. The report was started by E. G. Hill of the firm with the assistance of Knutson, and was completed by Knutson when Hill became seriously ill and was unable to complete the report or to testify with respect to his work on it. Under cross-examination, it developed that Knutson had no knowledge of the basis used by Hill for many of the estimates and that Knutson's contribution had been limited essentially to making certain computations on the basis of figures supplied by Hill. For the purpose of further discrediting the Ford, Bacon & Davis report, Panhandle introduced an estimate of the cost of constructing the line prepared by the engineering firm of Sanderson and Porter. This report, using the same cost of pipe and freight charges employed by Ford, Bacon & Davis, arrived at an estimated cost of $126,457,600. We have examined the testimony relating to both estimates. We are satisfied that a sufficient basis was established for introducing the Ford, Bacon & Davis report into the record,[82] al-

[82] Counsel for Bodell and Company objected to admission of the exhibit into evidence and now seeks review of the

though we recognize that it is entitled to only limited weight because of the method of its introduction. However, for the purposes of this opinion we do not believe that it is necessary to make any findings on the exact cost of the project, even if such a finding were possible, or to decide which of the two estimates is entitled to greater weight. We recognize that the ultimate cost may be in excess of applicants' estimate; however, after consideration of both exhibits and the testimony pertaining to cost, we do not think it has been demonstrated that the project is not a feasible one. The pipe line, therefore, may properly be considered in determining whether the proposed plan will advance compliance by American with the integration provisions of the Act. We shall have occasion to consider the cost of the project somewhat more in the section of this Opinion relating to the financing of the pipe line.

Compliance With Section 11 (b) (1)

Under the proposed plan, Madison will be disposed of. [fol. 650] The remaining properties of American will consist of (1) Michigan Consolidated, a gas utility company operating principally in the Detroit area in Michigan, but also serving sections in central and western Michigan, and its subsidiary, Austin, a pipe line company connecting the Austin storage fields with Detroit, (2) Milwaukee, a gas utility company operating in Milwaukee, Wisconsin, and its subsidiary, Milwaukee Solvay, which manufactures gas, and (3) Michigan-Wisconsin, which will construct, own, and operate the interstate natural gas pipe line extending from Texas to the Austin storage field in Michigan, with a branch line extending into Wisconsin to connect with Milwaukee and other Wisconsin communities.

Applicants contend that when the pipe lines are completed, (1) the properties of Michigan Consolidated and Milwaukee will constitute an "integrated gas utility system" within the meaning of Section 2 (a) (29) (B), and (2) the properties of Michigan-Wisconsin, Austin and Milwaukee Solvay will constitute "other businesses" which are so.

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hearing officer's action overruling his objection and admitting the exhibit. We find the exhibit was properly introduced and accordingly sustain the hearing officer's ruling.

related to the operation of the integrated system that they may properly be retained in the American system under the standards of Section 11 (b) (1). We shall consider each of these matters in turn.

(1) The definition of an integrated gas utility company is contained in Section 2 (a) (29) (B). It provides as follows:

"'Integrated public-utility system' means—

* * * * * * *

"(B) As applied to gas utility companies, a system consisting of one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation: Provided, That gas utility companies deriving natural gas from a common source of supply may be deemed to be included in a single area or region."

[fol. 651] We must therefore consider (a) whether coordinated operation of the properties of Michigan Consolidated and Milwaukee will result in substantial economies; (b) whether those properties may be deemed to be located in a "single area or region"; and (c) whether the size of such area or region is so large as to impair the advantages of localized management, efficient operation or the effectiveness of regulation.

a. Coordinated Operation and Substantial Economies.

The proposed pipe line system will result in an actual physical interconnection between Michigan Consolidated and Milwaukee. The utilization of underground storage will enable the line to operate at full capacity the year round and permit significant economies in operation and cost. The proposed method of operation will make for close coordination between the operations of Michigan Consolidated and Milwaukee, with central control synchronizing these operations to assure maximum use of the lines, adequate pressures in the lines and in the storage fields, and

allocation of gas to new customers in terms of line capacity and mutual needs.

The record indicates that substantial economies will result from the pipe line. For one thing, an adequate supply of additional natural gas to Michigan Consolidated will save the large expenditures for manufactured gas now required during peak periods and will assure adequate supplies to the western districts which are threatened with a severe shortage. Conversion to natural gas by Milwaukee will make additional expansion of manufacturing capacity unnecessary and will bring in gas at a price which will enable that company to earn a fair return, while the consumers in Wisconsin will be benefited by a reduction in gas rates. And the availability of additional gas will permit natural expansion of demand. Thus the Federal Power Commission has found:

"The proposed project has a distinct and readily recognizable advantage over the ordinary interstate natural-gas transmission pipe line system. The advantage lies in the fact that the project combines the operations of a high-pressure pipeline with the utilization and operation of large gas fields for underground storage purposes. This combi-[fol. 652] nation of transport and large scale storage facilities makes possible important economies in operation, permits flexibility and superior reliability of service, and enables a high load factor operation of the main pipeline system." (FPC Opinion No. 147, at mimeo. p. 11).

The record indicates that these economies will be reflected in benefits to consumers.

The applicants have also proposed the formation of a service company which they assert would afford additional economies in the joint operation of the properties. It has been estimated that annual savings of $280,000 would result to the system if certain functions relating to sales promotion, appliance sales, and similar matters were taken over by the service company. We think the evidence is inadequate to show the extent of any savings which might result from a service company which, in effect, proposes to have the staff of Michigan Consolidated perform both the functions which it now has and the similar functions now per-

formed by a separate staff at Milwaukee.[33] However, without regard to the question whether any substantial savings might result from the use of a service company, we find that the coordinated operation of Michigan Consolidated and Milwaukee would result in substantial economies.[34]

Objectors to the plan have endeavored to show that the proposed pipe line is not the only method for obtaining natural gas for the operating companies and that the economies referred to cannot be regarded as attributable solely to this project. They point out that Panhandle has *proferred* additional gas to Michigan Consolidated as its new additional facilities are being completed and they assert that this gas should be enough to meet all of Michigan Consolidated's estimated needs (excepting interruptable sales), which gas at the Panhandle rate of 18.5 cents per Mcf. would be substantially less than the Michigan-Wisconsin rate of at least 21 cents. They also point out that both Natural Gas Pipe Line Company of America [fol. 653] and Northern Natural Gas Company have lines terminating or passing near the Wisconsin border and suggest that those lines could be extended to serve Wisconsin more quickly and cheaply than the proposed project. At best, however, these arguments are based on conjecture as to what might be done to alleviate the problems of Michigan Consolidated and Milwaukee with no assurance that these possibilities could be realized or would in fact meet the problems. More important, however, is the fact that these arguments of objectors in effect assume that the proposed line is not in the public interest since others may be ready to supply the market at a lower price,[35] while the

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[33] The record on the service company is not complete. We do not here approve the service company and applicants will have to qualify the company in the usual manner under our rules and regulations.

[34] In making this finding, we have given due consideration to the expense of keeping American alive as a corporate entity.

[35] There is no evidence that either Natural Gas Pipe Line Company of America or Northern Natural Gas Company is ready or able to enter the Wisconsin market at this time and no applications to do so are pending before the Federal Power Commission.

proceedings before the Federal Power Commission were directly concerned with just that question and the Power Commission concluded that it was in the public interest for Michigan-Wisconsin to construct the line and serve those markets. Such a finding was peculiarly within the jurisdiction and expertise of the Power Commission and may not be collaterally attacked before us.

(b) Area or Region.

Section 2 (a) (29) (B) provides that companies deriving natural gas "from a common source of supply" may be deemed to be in a single area or region. The pipe line will, of course, provide Milwaukee and Michigan Consolidated with "a common source of supply." Should Panhandle agree to continue to serve Michigan Consolidated after the expiration of the present contract, Michigan Consolidated would then obtain its gas from two sources, one of which would not be available to Milwaukee. However, the statute does not require the companies to obtain all their gas from a common source of supply and since Michigan Consolidated will obtain most of its gas from Michigan-Wisconsin,[36] we need not determine whether the quoted provision of Section 2 (a) (29) (B) would be applicable if the situation were reversed. Under the circumstances presented, we think that Michigan Consolidated and Milwaukee would derive natural gas "from a common source of supply" and that their oper- [fol. 654] ations might properly be regarded as confined to a "single area or region."

c. Size.

Detroit, the principal market of Michigan Consolidated, is 249 airline miles and 368 railroad miles from Milwaukee. As indicated, the gross utility plant of Michigan Consolidated was stated on April 30, 1947, at $100,954,920, and that of Milwaukee on the same date at $32,533,321, or a combined utility plant of $133,488,241. The gross operating revenues of Michigan Consolidated for the twelve months ended April 30, 1947, were $36,816,777, those of Milwaukee for the same

[36] It is estimated that Michigan Consolidated in 1952 will take 67,706,000 Mcf. from Michigan-Wisconsin, of which 52,912,000 Mcf. is earmarked for Detroit. These estimates are in addition to the 32,000,000 Mcf. under the contract tendered to Panhandle.

period were $8,733,902, or total operating revenues for the two companies of $45,550,679. The population in 1940 of the region served by Michigan Consolidated was estimated at 2,345,600, of which 603,089 were customers of the company. The area served by Milwaukee has a population of approximately 800,000, of which 203,433 are customers of the company.

No objection has been made that the system will be so large as to impair efficiency of operations. The combined operations of the companies will be larger than the integrated gas utility systems of The Gas Service Company [37] and Northern Natural Gas Company,[38] which were found to meet the standards of section 2 (a) (29) (B), but substantially smaller than the combined operations which we approved for the Columbia Gas system.[39]

Michigan Consolidated will remain subject to regulation [fol. 655] by the Michigan Public Service Commission and Milwaukee will remain subject to regulation by the Public Service Commission of Wisconsin. Michigan-Wisconsin will continue under the jurisdiction of the Federal Power Commission, while American will remain a registered holding company subject to the jurisdiction of this Commission, as will be any service company which might be organized. Under the circumstances, we do not believe that the area or region to be served by the proposed coordinated operations is so large as to impair the effectiveness of regulation.

The record does not contain any evidence that the proposed system when interconnected will be so large as to impair the effectiveness of local management. The management of Michigan Consolidated and Milwaukee have always resided in the communities served and have had continuous

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[37] Cities Service Company, ——S.E.C.—— (1944), Holding Company Act Release No. 5028.

[38] The North American Company, ——S.E.C.—— (1945), Holding Company Act Release No. 5657.

[39] The aggregate gross gas utility properties of Columbia as of December 31, 1943, were stated at $347,344,212, with gross operating revenues for the year ending that date of $95,990,976. The system rendered retail services to 842,000 customers in a region with a total population in excess of 3,600,000. Columbia Gas & Electric Corporation, ——S.E.C. —— (1944), Holding Company Act Release No. 7054.

responsibility for operating and managing the properties. While it is true that instances may arise in the coordinated operation of the proposed system in which the immediate interests of a particular territory may not be fully satisfied, such an eventuality is characteristic of the very nature of coordination which is conducted with the overall and long run needs of all system properties in mind. Moreover, any such instances are more than offset by the advantages to be derived by the consumers of the territories from such proposed coordination and they need not necessarily result in impairment of local management to an extent which would be inconsistent with the standards of Section 2 (a) (29) (B).

We conclude that a substantial showing has been made that the pipe line, when completed, will permit the coordinated operation of Michigan Consolidated and Milwaukee, that such coordinated operation will result in substantial economies, and that the operations of the two companies will be confined to a single area or region, within the meaning of Section 2 (a) (29) (B), which is not so large as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation. These conclusions have been reached on the basis of the evidence introduced to support the proposals in the present plan based on [fol. 656] the hypothesis that the project will be completed and operated substantially as it has been proposed; they are not intended as a finding that the properties now form an integrated system. We will, of course, reserve jurisdiction to issue further orders and to take such further action as might be necessary to assure compliance with the statute should the project not be completed or should it take a form substantially different from that proposed in the plan.

(2) Having found that the proposals in the plan will enable Michigan Consolidated and Milwaukee to be regarded as an integrated gas utility system, we must now determine whether Michigan-Wisconsin, Austin and Milwaukee Solvay, which are non-utility properties under the Holding Company Act and therefore not a part of the integrated system (see Cities Service Company, —— S.E.C. —— (1944), Holding Company Act Release No. 5028), may be retained in conjunction with the integrated system under the "other business" clauses of Section 11 (b) (1).

Section 11 (b) (1), in so far as here relevant, requires that the operations of a holding company system be limited ". . . to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system . . ." It is further provided that:

"The Commission may permit as reasonably *incidental*, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems."

We have held that these standards *requre* a showing that the "other businesses" sought to be retained are intimately [fol. 657] related to the operations of the retainable public-utility properties.[40] On the basis of the facts previously stated, we believe it is clear that the relationship between the two pipe line companies and the operations of what will become the "integrated system" meet this test. As we have seen, the pipe line, in fact, is the integrating factor which will enable coordinated operation and bring about substantial economies in the system. We conclude that the pipe line companies may properly be retained as economically necessary and appropriate to the operations of the integrated system.

Milwaukee Solvay is at present closely related to the operations of Milwaukee, supplying 68.23% of Milwaukee's manufactured gas. All of Milwaukee Solvay's production is devoted to Milwaukee, while its by-products are sold through usual trade channels. It is clear that Milwaukee Solvay is now economically necessary and appropriate to the operations of Milwaukee. However, once natural gas is available

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[40] See North American Co. v. Securities and Exchange Commission, 133 F. 2d 148 (C.C.A. 2d, 1943); cf. Engineers Public Service Company v. Securities and Exchange Commission, 138 F. 2d 936 (Ct. App. D. C., 1943), dismissed as moot, ——U. S.—— (1947).

to Milwaukee, the function of Milwaukee Solvay will be changed. Applicants state that Milwaukee Solvay will then be held in a stand-by capacity in case of line failure or inadequate supply during periods of peak demand. In view of the manufacturing capacity of Milwaukee itself, which will also be retained for stand-by, there may be some question whether the production of Milwaukee Solvay will be needed and whether its operations will in time become completely disengaged from those of Milwaukee. For these reasons, while we find Milwaukee Solvay, on the basis of the facts now presented, economically necessary and appropriate to the operations of Milwaukee, we will reserve jurisdiction to reconsider this question if and when it appears that there has been a substantial change in the relationship of Milwaukee Solvay to the operations of Milwaukee.

We conclude that, if the proposed pipe line project is completed and operated in substantially the manner now proposed, the public utility properties of Michigan Consolidated [fol. 658] and Milwaukee will form an integrated system within the definition of Section 2 (a) (29) (B), and that Michigan-Wisconsin, Austin and Milwaukee Solvay, the nonutility properties, can be retained together with the integrated system under the standards of Section 11 (b) (1) of the Act. From what has been said with respect to the benefits flowing from coordinated operation of these properties, it is of course clear that continuance of American as the holding company to keep these properties under common control would be consistent with the Act.

Since the proposed pipe line would bring about the integration of the two operating companies and justify the continuance of American and thereby resolve its Section 11 (b) (1) problems under the Act, we find that the portions of the plan relating to the construction of the pipe line and the transactions incidental thereto provide an appropriate means of complying with Section 11 (b) and, therefore, satisfy the "necessity" standard of Section 11 (e).

We turn to a consideration of the other provisions of the plan as to which the "necessity" standard is applicable.

Proposed Divestments

In 1941 Railways was ordered to dispose of its interest in American and its subsidiary companies, and American was ordered to divest itself of Detroit Edison. That order has

become final. The present plan proposes to accomplish those divestments by the end of 1948 [41] and thereafter to separate completely the operations of American from Railways. It also proposes that American will dispose of its interest in Madison.

American will dispose of the 1,418,125 shares of Detroit Edison which it presently owns through sale, by dividends to common stockholders in lieu of cash, and by pro rata distribution to its common stockholders. The sale will be made [fol. 659] in three blocks: 450,000 shares in December, 1947;[42] 400,000 shares in May, 1948; and 250,000 shares in October, 1948. A total of 138,796 shares will be distributed in four quarterly dividend distributions, and the balance of 179,329 shares will be distributed to stockholders sometime in December, 1948. Since the proceeds from the sale of this stock are to be used by American to finance its common stock purchases of Michigan-Wisconsin, the number of shares sold as well as the amount remaining for distribution will depend upon the prices received for the stock. The foregoing estimates are based on an assumed net realization of $22 a share.

Railways will dispose of its interests in American by tendering for sale the 202,528 shares of American preferred which it owns in response to American's offer to purchase its outstanding preferred at $33 per share, and will dispose of the 1,513,444 shares of American common which it owns through rights offerings to its own common stockholders and through dividend declarations to such common stockholders. The rights will be issued on a basis of one for each five shares of Railways owned and will entitle the holder to purchase American common for not more than $12 per share, the first rights offering of 634,767 shares to be made in April, 1948, and a second offering of 634,205 shares

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[41] Application No. 31 originally provided for extending the divestments over a considerably longer period of time. The present schedule was adopted after we had expressed doubt whether, in this respect, the plan provided for compliance as expeditiously as possible. The United Light and Railways Company, ——S.E.C.—— and ——S.E.C.— (1947), Holding Company Act Releases Nos. 7683 and 7778.

[42] We have already approved this transaction. See n. 15, supra.

to be made in December, 1948. The balance of 244,472 shares owned by Railways will be declared as dividends to common stockholders in lieu of cash over the four quarters of 1948. The Detroit Edison shares received as dividends and in distribution from American will be sold in two installments; 49,628 shares in October, 1948 and 50,365 shares in December, 1948, while the 146,265 shares of Madison received from American will be sold in May, 1948. These sales will be the subject of special applications to this Commission.

In order to complete the separation of Railways and American it is proposed that, at or prior to the last rights offering of American common by Railways to its shareholders, all interlocking of officers and directors and all contractual relations between the American Light system and [fol. 660] the Railways system shall be terminated.[43] That action is clearly required by the statute. However, it is not proposed that an election of a new American board will be held at that time but it is contemplated that an election will take place in the usual course of business at the next regularly scheduled meeting. Under the circumstances and in view of the representations that there will be a complete separation of relationships between the two companies, we see no need to require a special election in advance of the regularly scheduled meeting.

The foregoing divestments are specifically required by our outstanding order of August 5, 1941. We find that the proposed transactions constitute an appropriate means of complying with Section 11 (b) (1), and therefore satisfy the "necessity" standard of Section 11 (c).

American also proposes to divest itself of Madison by a pro rata distribution to its common stockholders on February 28, 1948. Madison is predominantly an electric utility company, less than 30% of its revenue being derived from gas operations. It is clear, therefore, that it could not be regarded as part of the integrated gas utility system[44] and

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[43] Certain of the communities in Missouri and Iowa which are to be served by Michigan-Wisconsin are presently contained in the Railways system. There is no need for us to determine at this time what steps may be appropriate as a result of this relationship when Railways' holdings in American are divested.

[44] See The United Gas Improvement Company, 9 S.E.C. 52, 77 (1941).

there is considerable question whether a showing could be made to justify its retention as an additional system or systems meeting the standards of Section 11 (b) (1). No such showing has been attempted here. Under the circumstances, we think the divestment of Madison may be deemed an appropriate step in compliance with Section 11 (b) and therefore also meets the "necessity" standard of Section 11 (e).

Modifications in Capital Structure

Railways proposes to retire its presently outstanding debt and to redeem its outstanding preferred stock. As part of this program, the remaining debt of Continental Gas will [fol. 661] also be eliminated. We have previously indicated that the debt and preferred stock of Railways and the debt of Continental Gas must be eliminated under the standards of Section 11 of the Act,[45] and the present plan provides an appropriate and expeditious method for accomplishing that result. We shall consider the various related transactions in greater detail in our discussion of the fairness of the plan and in passing upon the new securities which will be issued under the plan.

American proposes to offer to purchase its outstanding preferred stock at a price of $33 per share. It is clear that the existence of non-callable preferred stock, particularly in the capital structure of a holding company, constitutes an undue and undesirable complexity; the rigidity imposed by reason of such a security prevents the company from adjusting its capital charges and ratios to meet changing economic conditions and corporate requirements. Since the proposed offer will be a voluntary one which stockholders may reject or accept, it cannot be determined in advance how much of the preferred stock will be retired. However, the elimination of any part of the issue will contribute to the simplification of American's capital structure and mitigate to that extent the complexity which stock of that type represents under the standards of Section 11 (b) (2). The accomplishment of that result in the manner proposed is an appropriate means of satisfying the "necessity" standard. We shall consider the "fairness" of the offer, both to

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[45] The United Light and Power Company, ——S.E.C.—— (1945), Holding Company Act Release No. 6249.

the preferred stockholders and the common stockholders of American, in the next section of this Opinion.

(The section of the findings and opinion entitled "B. Fairness", wherein the sub-topics "Fairness to American's Preferred Stockholders", "Fairness to American's Common Stockholders" and "Fairness to Railway's Security Holders" are discussed, and that portion of the section entitled "Issuance and Acquisition of Securities" wherein the sub-topics, "Issuance of Debt by Railways" and "Issuance of Debt by American" are discussed, are omitted by stipulation of the parties to this appeal.)

[fol. 662] Financing the Pipe Line Project

The plan contains several provisions related to the immediate financing of the pipe line as to which our approval is requested but does not present for our consideration the complete financing of the entire line. Further applications will be filed as construction progresses and additional funds are required.

(1) Austin.

The Austin line and facilities will cost an estimated $9,394,500, and we are asked to approve the financing for slightly in excess of that amount.

Under the plan, American will acquire an additional 285,714 shares of common stock of Michigan Consolidated ($14 par) for cash at the par value thereof. Michigan Consolidated will invest a portion of the proceeds in purchasing for cash the 25 shares of Austin now held by incorporators and 29,975 additional shares ($100 par), all for cash at the par value thereof. From time to time as funds are needed, Austin will borrow up to $6,500,000 from banks on terms and conditions set forth in a Credit Agreement made part of this record. The loan matures on December 31, 1951, or at such earlier date as the facilities of Austin may be sold to Michigan-Wisconsin. The loan may be prepaid at a small premium. In conjunction with the Credit Agreement, Michigan Consolidated will execute a "Purchase Agreement" committing it to purchase the notes at any time after maturity (including accelerated maturity for breach of condition).

Allied has argued that the "Purchase Agreement" is in reality a guarantee or assumption of indebtedness by Michi-

gan Consolidated in violation of charter protective provisions for the preferred stock limiting additional unsecured indebtedness. On an examination of the provision, we are not persuaded that transactions of this type were intended to be encompassed within it, but it is unnecessary at this time to decide that matter finally since, in any event [fol. 663] the present proposal, covering $6,500,000, is well within the indebtedness permitted.[66]

The financing of Austin is an intermediate step before Michigan-Wisconsin acquires all of its assets for cash at original cost less depreciation. We find that the various transactions proposed in this connection accord with the standards of Sections 7, 9, 10 and 12, and they are therefore approved.

(2) Michigan-Wisconsin.

The Ford, Bacon & Davis estimate of $104,530,800 as the total cost of the project, including Austin, was used as a basis for setting up a tentative financing schedule. Of the $104,530,800, the sum of $7,476,700 would be met by annual depreciation charges occurring in the years through 1952, when the line is to be in full operation, leaving $97,054,100 to be obtained in actual capital. The following was indicated by applicants as the tentative capital structure of Michigan-Wisconsin.

$25,000,000	Common Stock
50,000,000	3¼% 20 Year First Mortgage Bonds
10,000,000	2½% 6 Year Serial Notes
14,000,000	5% Preferred Stock
$99,000,000	

[66] The charter provision limits unsecured indebtedness to 10% of the aggregate of "(i) the total principal amount of all bonds or other securities representing secured indebtedness issued or assumed by the company and then to be outstanding, and (ii) the total of the capital and surplus of the company as then stated on its books. . . ." Following the recent issuance by Michigan Consolidated of additional debt, its balance sheet showed total secured debt, preferred and common equity and surplus of $91,113,026.37, and no unsecured debt.

American will supply the entire common stock equity of $25 million and construction of the line will proceed until that amount has been expended. Senior securities will be sold publicly as additional funds are needed. At this time we are asked only to approve the investment by American of $25,000,000 in common stock of Michigan-Wisconsin; the remaining financing is not now before us. Separate appli- [fol. 664] cations will be filed from time to time as additional financing is necessary.

Applicants have introduced an exhibit containing a projection of earnings based on the estimated cost of construction of $104,530,800, an average gas rate of 21 cents per Mcf., the issuance of senior securities at the rates indicated above, the allowance of depreciation at 3⅓%, and the Ford, Bacon & Davis forecast of operations. It is estimated that in its first year of operation (1950), Michigan-Wisconsin will have operating revenues of $11,190,400 and a net income of $1,711,900. For 1952, the first year of full operations, total operating revenues are estimated at $22,680,000, with a net income of $4,626,100 before preferred dividends, and earnings available for the common of $3,926,100.[67]

Edward Hopkinson, Jr., an expert witness on behalf of applicants, testified that in his opinion the financing program outlined by applicants was a feasible one which could probably be carried out in the absence of a sudden change in economic conditions. His conclusions, however, were based completely on the Ford, Bacon & Davis study and their estimates of probable future earnings. As we have seen, that study is entitled to only limited weight in this proceeding in view of the manner of its introduction, the con-

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[67] The corporate earnings of American common are estimated as follows:

Assuming 85% preferred stock retired

	1947	1948	1949	1950	1952
Earnings per share	$1.45	$1.22	$1.05	$2.04	$2.26
Dividends	$1.20	$1.23	$1.20	—	—

Assuming 100% preferred stock retired

	1947	1948	1949	1950	1952
Earnings per share	$1.45	$1.26	$1.09	$2.09	$2.30
Dividends	$1.20	$1.23	$1.20	—	—

flicting evidence of the Sanderson and Porter report, and the increase in prices which has occurred since the study was completed. Moreover, on cross-examination, Hopkinson recognized that the pending appeal concerning the validity of the certificate might create a "serious obstacle" to senior financing until the appeal had been determined. He was unaware of any challenge to the gas reserves and admitted that if other engineers were to produce a report at serious variance with that made by Ford, Bacon & Davis, [fol. 665] a reexamination of the entire matter of reserves would be required prior to any public sale of securities.[68]

Ralph E. Badger, an expert witness called in behalf of Allied, testified that in his opinion senior securities of the type proposed could not be marketed at the contemplated rates, that it would be impossible to sell $14 million of preferred stock after $60 million of debt with only $25 million of common equity, and that the uncertainty over the ultimate cost of the project and the adequacy of the reserves, and the litigation over the certificate would make it impossible to undertake any senior financing until such matters were resolved.[69]

The responsibilities which have been delegated to this Commission by the Holding Company Act require that we

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[68] Aside from the litigation over dedicated acreage, there has been a conflict in evidence before the FPC and in this proceeding over the ability of the dedicated acreage fully to supply the line. A majority of the FPC favored the evidence and methods used by witnesses of applicants over that produced by Panhandle. For the purposes of this proceeding, we accept the FPC conclusions, not only because the matter is primarily within their jurisdiction, but also because of their greater knowledge of this highly technical field.

[69] Objectors also point to a condition in the Phillips' contract which appears to require construction of the pipe line to be advanced across the Missouri River by January 1, 1949, and assert that it will be impossible to obtain the capital required in that space of time in view of the pending litigation. Since time is of the essence, we think it reasonable to assume that the courts will expedite the litigation to avoid any unnecessary delay which might produce a forfeiture of rights under the contract.

view transactions of this sort to determine whether they conflict with the standards set forth in that Act. Objectors to the plan have pointed to the several uncertainties and obstacles to be overcome if the pipe line project is to be completed as presently planned and they urge that these uncertainties and obstacles are so important as to make any investment by American at this time improvident and imprudent. We have given these matters careful consideration. We think it apparent that there is a point at which a proposed investment might so clearly appear to be imprudent and irrational that it would be our duty under the Holding Company Act, notwithstanding the management's decision to the contrary, to prohibit the proposed action. [fol. 666] But we do not think such a case has been presented here. Every new economic venture is beset with difficulties at the outset, and an undertaking as large as the present one, with the numerous regulatory approvals required and competitive obstacles which must be overcome, is no exception. The decision to go forward under the circumstances is primarily for management to make. That decision has been made. Recognizing that there are real and substantial risks involved in the pipe line project, we do not think the management's decision can be regarded as irrational or without any reasonable basis and we find nothing in the Holding Company Act which warrants our interference with it. We conclude that the proposed investment of $25 million dollars in the common stock of Michigan-Wisconsin is consistent with the applicable provisions of the Act and it is, therefore, approved.[70]

We recognize that the senior financing program is a tentative one and that it may have to be altered to meet market conditions at the time the funds are sought. We also recognize that any increase in the cost of the project above present estimates will require some modification in the plans. In this connection, we emphasize again that we are not now approving any capital structure based wholly on a common stock equity of $25 million. The capital structure of Michigan-Wisconsin, as well as the adequacy of the common contribution, will have to be determined as the situation develops. It may well be that the common equity now contemplated will prove inadequate to support a properly pro-

[70] We have already approved the investment of $4,000,000 of this amount. See n. 8, supra.

portioned capital structure and may have to be increased. We do not consider that question to be before us at this time.

(The section of the findings and opinion entitled "Other Matters" wherein the sub-topics "Motion by City of Detroit", "Lifting of Dividend Restriction", "Tax Recitals", "Fees and Expenses", "Accounting Treatment", and "Limited Participation of Certain Common Stockholders" are discussed, are omitted by stipulation of the parties to this appeal.)

[fol. 667] Conclusion

The plan is approved, subject to the reservations of jurisdiction indicated in the foregoing findings.

Because of the time pressures inherent in this proceeding, we find that due and timely execution of our functions imperatively and unavoidably requires that our decision herein should not be preceded by an intermediate decision and that we should not delay the effective date of our order herein. Accordingly, an appropriate order will issue and will be effective immediately.

By the Commission (Chairman Caffrey, Commissioners McConnaughy, Hanrahan and McDonald), Commissioner McEntire being absent and not participating.

Orval L. DuBois, Secretary. (Seal.)

(The appendixes to the foregoing findings and opinion are omitted by stipulation of the parties.)

United States of America. Before the Securities and Exchange Commission at a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pa., on the 30th day of December, A. D., 1947.

In the Matter of The United Light and Railways Company, American Light & Traction Company, et al. File Nos. 59-11, 59-17 and 54-25. (Public Utility Holding Company Act of 1935).

Order

The United Light and Railways Company ("Railways") and its subsidiary, American Light & Traction Company ("American"), both registered holding companies, having filed on June 26, 1947, an application designated as Application No. 31 pursuant to the provisions of Section 11 (e) and

other applicable sections of the Public Utility Holding Company Act of 1935 and the Rules and Regulations of the Commission promulgated thereunder, for the approval of a plan of reorganization for the purpose of complying with the provisions of Section 11 (b) of the Act and with an order of this Commission dated August 5, 1941, and said applica- [fol. 668] tion having been amended on September 18, 1947, and October 28, 1947;

Public hearings having been held on such plan of reorganization as amended after appropriate notice in which all interested persons were given opportunity to be heard, briefs having been filed and oral argument having been heard;

The applicants having requested that the Commission enter an order finding the proposed transactions to be necessary to effectuate the provisions of Section 11 (b) of the Public Utility Holding Company Act of 1935 and fair and equitable to the persons affected thereby, and that such order contain recitals in accordance with the requirements of Section 1808 (f) and Supplement R of the Internal Revenue Code, as amended; and having further requested the Commission to enter an order permitting the transactions proposed in the plan to become effective forthwith;

The Commission having considered the entire record herein and having this date issued its Findings and Opinion finding the amended plan to be necessary to effectuate the provisions of Section 11 (b) and fair and equitable to the persons affected thereby, and the Commission having further found that the transactions proposed should be permitted to the extent indicated in said Findings and Opinion;

It Is Ordered pursuant to the applicable provisions of the Act that the amended plan of reorganization be, and hereby is, approved, subject, however, to the conditions specified in Rule U-24 and subject to the following terms and conditions:

1. That jurisdiction be and it hereby is reserved to the Commission to approve, disapprove, modify, allocate or award from the assets of applicants by further order or orders, all fees or other compensation and all remuneration or expenses claimed or hereafter claimed by any persons

in connection with the amended plan, transactions incident thereto, and the consummation thereof;

2. That jurisdiction be and it hereby is reserved to the Commission to take such further action as the Commission may deem necessary or appropriate to effectuate the requirements of Section 11 (b) of the Act, including, but not [fol. 669] limited to, the retainability in the American system of Milwaukee Solvay Coke Company and the ordering of such steps as may be necessary to bring about compliance by American, Railways, and Continental Gas & Electric Corporation with the provisions of Section 11 (b);

3. That jurisdiction be and it hereby is reserved to the Commission to entertain such further proceedings, to make such supplemental findings and to take such further action as the Commission may deem appropriate in connection with the amended plan, the transactions incident thereto and the consummation thereof and the accounting entries in connection therewith, and to enter such further orders as may be necessary to secure full compliance with the Act;

4. That jurisdiction be and it hereby is reserved to the Commission over the further financing of Michigan-Wisconsin Pipe Line Company ("Michigan-Wisconsin") and to enter such further orders as may be necessary under the Act in connection with such financing; and

5. That jurisdiction be and it hereby is reserved to the Commission to pass upon such transactions as are reserved for later action in accordance with the provisions of said amended plan.

It Is Further Ordered that the restriction on common dividend payments by Railways imposed by our order of November 28, 1945, be and hereby is removed;

It Is Further Ordered and Recited that the steps and transactions itemized below in the consummation of the plan as amended are necessary or appropriate to the integration or simplification of the holding company system of which American and Railways are members and are necessary or appropriate to effectuate the provisions of Section 11 (b) of the Public Utility Holding Company Act of 1935:

(1) the distribution and transfer by American to its common stockholders, as dividends in kind, of shares of common stock of Detroit Edison Company ("Detroit Edison") of the par value of $20 per share, such dividends to be paid quarterly at the rate of one share of Detroit Edison common stock for each 75 shares of common stock of American (together with cash in lieu of fractional shares);

[fol. 670] (2) the purchase by American of up to 250,000 shares of the common stock of Michigan-Wisconsin at the par value thereof of $100 per share and of not in excess of 285,714 shares of common stock of Michigan Consolidated Gas Company ("Michigan Consolidated") at the par value thereof of $14 per share, to the extent that American in consummating purchases of either or both such common stocks, shall expend proceeds derived from sales of common stock of Detroit Edison or other funds not in excess of such proceeds;

(3) the sale and transfer by American from time to time of such number of shares of common stock of Detroit Edison as shall be necessary to enable American to complete its investment in common stocks of Michigan-Wisconsin and Michigan Consolidated as set forth in (2) above and to meet the reasonably foreseeable needs of American and its subsidiaries;

(4) the expenditure by American of the proceeds of sales of common stock of Detroit Edison, or of other funds not in excess of such proceeds, in the purchase of common stocks of Michigan-Wisconsin and Michigan Consolidated, as set forth in (2) above;

(5) the distribution and transfer by American to its common stockholders, as a dividend in kind, of all remaining shares of common stock of Detroit Edison not distributed or reserved for distribution as set forth in (1) above or sold as set forth in (3) above;

(6) the issuance by American of its ten year serial notes in an aggregate principal amount not in excess of $15,000,000 in connection with the borrowing of funds to be used in purchasing its outstanding 6% preferred stock of the par value of $25 per share;

(7) the distribution and transfer by American to its common stockholders, as a dividend in kind, of the 276,805

shares of common stock of the par value of $16 per share of Madison Gas and Electric Company now owned by its (out of certificate Nos. TU1 and TU2);

(8) the distribution and transfer by Railways to its common stockholders, as dividends in kind, of shares of common stock of American of the par value of $25 per share, [fol. 671] such dividends to be paid quarterly at the rate of one share of common stock of American for each 50 shares of common stock of Railways (together with cash in lieu of fractional shares);

(9) the sale and transfer by Railways to American of the 202,528 shares of 6% preferred stock of the par value of $25 per share of American now owned by Railways (evidenced by certificate Nos. NPS 330 and NPX 1482) at a price of $33 per share (plus an amount equal to the unpaid accrued dividends on such shares, pursuant to the offer to purchase such shares at such price to be made by American;

(10) the sale and transfer by Railways to its common stockholders of common stock of American, pursuant to offerings to be made to such stockholders on the basis of one share of such common stock of American Light for each five shares of common stock of Railways;

(11) the sale and transfer by Railways of all shares of the common stocks of Detroit Edison and Madison Gas and Electric Company to be received by it as dividends in kind or distributions on its common stock in American;

(12) the expenditure by Railways of the proceeds of the sale of 6% preferred stock of American and of common stocks of American, Detroit Edison and Madison Gas and Electric Company referred to in (9), (10) and (11) above, or of other funds not in excess of such proceeds, to pay, retire and cancel its outstanding notes, maturing December 31, 1948, issued under its loan agreement dated November 24, 1945, as amended, and to pay, in part, the final maturity of the notes (or other obligations) referred to in (13) below; and

(13) the issuance by Railways of its 15 year serial notes (or other obligations) in an aggregate principal amount of $28,500,000 in connection with the borrowing of funds to be

used in redeeming its outstanding prior preferred stock of the par value of $100 per share, consisting of three series bearing dividends at the rates of 7%, 6.36% and 6%, respectively, and in investing $9,000,000 in common stock without par value of Continental Gas & Electric Corporation.

[fol. 672] By the Commission.

Orval L. DuBois, Secretary. (Seal.)

NOTE RE PLAINTIFF'S EXHIBIT 53

Plaintiff's Exhibit 53 is an amendatory agreement between Michigan-Wisconsin Pipe Line Company and Phillips Petroleum Company, dated September 11, 1946, which amended the contract between said parties dated December 11, 1945 (Exhibit 1 to the complaint) by (1) substituting the date, December 1, 1946, for the date, September 1, 1946, in Article I, Section 3, Subparagraph (a) and by (2) amending the language of Article VIII, Section 2, pertaining to an adjustment of prices "to protect the parties thereto from too great burden under the price provisions of this contract in the event of abnormal inflation or deflation of prices of commodities generally."

NOTE RE PLAINTIFF'S EXHIBIT 54

Plaintiff's Exhibit 54 is a second amendatory agreement between Michigan-Wisconsin Pipe Line Company and Phillips Petroleum Company, dated October 16, 1946, which amended the contract between said parties dated December 11, 1945 (Exhibit 1 to the complaint), in the following respects:

(1) by substituting the date, March 1, 1948 for the date, March 1, 1947, in Article I, Section 3, Subparagraph (c);

(2) by substituting the date, January 1, 1949, for the date January 1, 1948, in Article I, Section 3, Subparagraph (d);

(3) by amending Article III, Section 2, to read as follows:

"Subject to the provisions of this contract, Buyer agrees, beginning on July 1, 1949, to purchase and receive from

Seller during each twelve-month period not less than the following average daily volumes of gas:

Year	Million Cubic Feet
July 1, 1949, to June 30, 1950	132
July 1, 1950, to June 30, 1951	146
July 1, 1951, to June 30, 1952	160
July 1, 1952, to June 30, 1953, and each twelve-month period thereafter	255"

[fol. 673] (4) by substituting the date July 1, 1949, for the date July 1, 1948, in the first sentence of Article III, Section 4.

Note Re Plaintiff's Exhibits 55-68

Plaintiff's Exhibits 55 Through 68—Proceedings Before the Public Service Commission of Wisconsin

These exhibits consist of certified copies of applications to the Public Service Commission of Wisconsin and docket cards of that commission, the latter showing the dates of the events in the following proceedings before said commission (the date of the filing of the application in each proceeding being indicated in parenthesis):

Wisconsin Gas and Electric Company, CA-2534 (May 28, 1947); Wisconsin Power and Light Company, CA-2516 (April 25, 1947); Wisconsin Fuel and Light Company, CA-2500 (April 7, 1947); Stoughton Light and Fuel Company, CA-2588 (September 15, 1947); Madison Gas and Electric Company, CA-2289 (December 27, 1945); Milwaukee Gas Light Company, CA-2290 (December 29, 1945); and Wisconsin Public Service Corporation, CA-2482 (March 10, 1947).

The applications of the several public utility companies whose names appear above were to obtain authorization from the Wisconsin Public Service Commission to convert from manufactured gas to natural gas in supplying numerous cities, towns and villages in the State of Wisconsin, including the cities of Milwaukee and Madison. The applications recite that the conversion to natural gas would be in the general public interest and was required by public convenience and necessity, and some of them recite that such conversion would make a more adequate supply of gas available and at a more economical cost to the respective communities served locally by the applicants, and some of them

recite that the natural gas was to be obtained from the pipe line system of Michigan-Wisconsin Pipe Line Company which system was to extend from the Hugoton Gas Field to Wisconsin and other states. The docket cards show that a number of hearings were conducted and transcripts filed, that the last such transcript was filed in the cases on Novem-
[fol. 674] ber 5, 1947, and that no decision had been rendered at or prior to the time of the certification of these exhibits on January 17, 1948.

PLAINTIFF'S EXHIBIT 71

State of Oklahoma

(Seal of the State of Oklahoma.)

Office of Secretary of State

To all to whom these Presents Shall Come, Greeting:

I, Wilburn Cartwright, Secretary of State of the State of Oklahoma, do hereby certify that the following and hereto attached is a true copy of Appointment of W. R. Wallace Agent for Magnolia Petroleum Company, Texas, filed April 24, 1941, the original of which is now on file and a matter of record in this office.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of State. Done at the City of Oklahoma City, this first day of October, 1947.

Wilburn Cartwright, Secretary of State; L. O. Abney, Assistant Secretary of State. (Seal.)

Appointment of Agent

Know All Men by These Presents:

That the Magnolia Petroleum Company, a corporation organized under the laws of the state of Texas and which has a permit to do business in the State of Oklahoma, does hereby nominate and appoint for itself and successors, the following named person, to-wit: W. R. Wallace, as its agent and attorney in fact within the State of Oklahoma, who is a citizen of the State of Oklahoma and who resides in the City of Oklahoma City, Oklahoma County, the Capital of Oklahoma, at No. 2419 N. Harvey Street, as its true and

lawful agent and attorney upon whom services of process, mesne, and final may be had in any action in the State of Oklahoma to which the said Company may be a party.

And said Company does hereby and now acknowledge it [fol. 675] is bound by the services of all such process, mesne and final on said agent and attorney in fact and acknowledges the same to be as binding and obligatory upon the Company as if served on it in person under the laws of Oklahoma or any other State or Territory, and consents that such service shall be taken and held to be a due and legal service on this Company under the laws and statutes of the State of Oklahoma.

Said Company consents that all actions against it may be brought in the county in which the cause of action arose, as now provided by law.

Said Company hereby certifies that W. R. Wallace, whose address is Seventh & Broadway, Oklahoma City, Oklahoma, is its resident, agent in charge of its principal place of business in the State of Oklahoma.

In Witness Whereof, the said Company has caused its name to be subscribed hereto by its president and caused this instrument to be attested by its secretary under its corporate seal, this 23rd day of April, A. D., 1941.

Magnolia Petroleum Company, By D. A. Little, Its President; Guy L. Tate, Secretary.

[Corporate Seal.]

Attest:

Filed April 24, 1941. Recorded in Volume 278, page 22. C. C. Childress, Secretary of State; By K. Manton, Assistant.

Note Re Plaintiff's Exhibit 72

Plaintiff's Exhibit No. 72—Draft of Contract as Submitted by Phillips Petroleum Company to Skelly Oil Company November 6, 1945.

On November 6, 1945, when representatives of Phillips Petroleum Company and Skelly Oil Company were negotiating the Phillips-Skelly Gas Purchase Contract, representatives of Phillips handed to representatives of Skelly plaintiff's Exhibit 72, which was a ditto draft of the Michigan-[fol. 676] Wisconsin-Phillips proposed contract, after cut-

ting out of it all of Article VII and subparagraph 1 of Article VIII which pertain respectively to the natural gasoline plant and the price to be paid Phillips by Michigan-Wisconsin. Otherwise this draft of the contract was the same as the final one executed by Phillips Petroleum Company and Michigan-Wisconsin Pipe Line Company, dated December 11, 1945 (Exhibit 1 to the complaint), except for minor changes not material here. The language used in Sections 3 and 4 of Article I of the contract of December 11, 1945 (Exhibit 1 to the complaint) was identical with the language contained in said draft copy.

PLAINTIFF'S EXHIBIT 73

[Stamp:] United States Court of Appeals for the District of Columbia. Filed March 18, 1947. Joseph W. Stewart, Clerk.

In the United States Court of Appeals, District of Columbia. No. 9482. Panhandle Eastern Pipe Line Company, a Corporation, Petitioner, v. Federal Power Commission, Respondent.

On Petition to Review Order of Federal Power Commission.

Motion to Extend Time of Filing Transcript of Record

Bradford Ross, General Counsel, Federal Power Commission. Charles E. McGee, Assistant General Counsel.

To the Honorable Justices of the United States Court of Appeals for the District of Columbia:

Now comes the Federal Power Commission, respondent herein and respectfully moves the Court, pursuant to Rule 32(b) of the General Rules of this Court, to extend the time for filing the transcript of record before the Federal Power Commission (as provided by Rule 38(d) of the General Rules of this Court) in the above entitled cause until May 14, 1947, and in support of said motion states:

I

[fol. 677] Petitioner in this proceeding is seeking to review under Section 19(b) of the Natural Gas Act of June 21, 1938, c. 556 (52 Stat. 831), Title 15 U. S. C. 717-717W, principally the Federal Power Commission's order of November

30, 1946,[1] as supplemented by its order of December 30, 1946,[2] granting and issuing a certificate of public convenience and necessity to the Michigan-Wisconsin Pipe Line Company, a Delaware corporation (hereafter sometimes referred to as "Michigan-Wisconsin"), to construct and operate certain natural-gas pipeline facilities for the transportation and sale of natural gas in interstate commerce.

The application,[3] which was the subject of the proceeding before the Federal Power Commission, was filed with the Commission on September 24, 1945, by Michigan-Wisconsin pursuant to Section 7 of the Natural Gas Act, as amended, for a certificate of public convenience and necessity authorizing the construction and operation of a natural gas transmission pipeline extending from the Hugoton Field in Texas and terminating in the Austin Storage Field, Mecosta County, Michigan, including branch natural gas transmission pipelines for supplying markets in Iowa, Missouri, Wisconsin, and the Detroit and Ann Arbor Districts in the State of Michigan. In addition, it was proposed that such facilities be used for the purpose of transporting natural gas for storage in the Austin Field.

II

On November 30, 1946, after a lengthy hearing consuming many thousands of pages of testimony, approximately 400 exhibits, and innumerable pleadings the Commission issued a certificate of public convenience and necessity to Michigan-Wisconsin, pursuant to Section 7 of the Natural Gas Act.

In paragraph (C) of the November 30, 1946, order, the Commission stated that for the purpose of computing the [fol. 678] time within which applications for rehearing may be filed the date of the issuance of that order shall be deemed to be the date of issuance of the opinions or of the supple-

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[1] Appendix A.

[2] Appendix B.

[3] Amended March 13, and July 22, 1946.

mental order therein referred to, whichever may be the later.[4]

Such action was taken by the Commission so as not to deprive any party to the proceeding of the right of rehearing not only of the November 30, 1946 order, but of all opinions and the supplemental order to be thereafter issued in this proceeding.

III

On December 30, 1946, the Commission issued an order supplementing the order of November 30, 1946, and reopening the proceeding for the limited purpose of receiving further evidence with respect to subparagraph (B) (viii) of the order of November 30, 1946. Thereafter a hearing was held commencing on January 15 and concluding on January 17, 1947, for the purpose of receiving such evidence.

IV

The Commission, by its order dated January 14, 1947, denied Panhandle's applications for rehearing of the Commission's orders of November 30 and December 30, 1946. It was pointed out in such order that paragraph (C) of the Commission's order of November 30, 1946, provided for the computation of time within which applications for rehearing may be filed. The Commission's order of January 14, 1947, also made reference to the fact that at that time neither the opinions nor the supplemental order referred to in the November 30 order had been issued and that, therefore, the applications for reconsideration or rehearing were premature in that they were filed in advance of such opinions and order. The denial of such applications was without prejudice to the filing of further applications for rehearing within 30 days of the date of the issuance of the opinion or of the supplemental order, whichever is the later.

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[4] Paragraph (C):

"For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later."

[fol. 679]

V

On February 7, 1947, Panhandle filed its petition in this proceeding in this Court to review and set aside the Commission's orders of November 30 and December 30, 1946, and for leave to adduce additional evidence and for stay.[5] The Commission issued its Opinion No. 147 on February 7, 1947, as contemplated by the Commission's order of November 30, 1946. The supplemental order referred to in subparagraph (B) (viii)[6] of the Commission's order of November 30, 1946, was issued on March 12, 1947. The petition for review does not include the Commission's opinions issued February 7, 1947, or the Commission's supplemental order and opinion issued March 12, 1947.[7] The latter date designates the commencement of the toiling of the statute with respect to filing petitions for rehearing of the Commission's order of November 30, 1946, and related orders as prescribed in paragraph (C) of the aforementioned order including said supplemental order issued on March 12, 1947.

VI

In order to protect the rights of review of the various parties hereto and to afford them an opportunity for filing petitions for rehearing with the Commission of all of its opinions and orders in accordance with Section 19(a) of the Natural Gas Act, and to provide sufficient time within which to permit the Commission to dispose of such petitions, it is necessary that the Court grant the extension of time requested herein for filing the transcript of record with the Court.

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[5] A further motion for stay of the Commission's orders was filed on February 24, 1947, by Panhandle and was denied by this Court on February 28, 1947.

[6] Appendix C.

[7] Commission's Supplemental Opinion and Order of March 12, 1947, are made a part of Appendix C hereto. It is noted in connection therewith that neither the Commission's Opinion of February 7, 1947, nor its Supplemental Opinion and Order issued March 12, 1947, are made the subject of this review and that such opinions and order represent the majority view of the Commission. The dissenting opinion of Commissioner Olds is to follow.

Wherefore, the Respondents and Movants herein, for the [fol. 680] reasons set forth above, move for the extension of time heretofore requested.

Respectfully submitted, Bradford Ross, General Counsel, Charles E. McGee, Assistant General Counsel, Attorneys for Federal Power Commission.

Dated at Washington, D. C.
This 18th day of March, 1947.

Proof of Service

I hereby certify that on March 18, 1947, I duly served a copy of the within motion to extend time of filing transcript of record upon Counsel for Panhandle Eastern Pipe Line Company by depositing the same on such date in the United States Post Office, at Washington, D. C., addressed to each of the Attorneys of record named below, at their respective Post Office addresses.

——, ——, Bradford Ross, General Counsel.

Ira Lloyd Letts, 32 Custom House Street, Providence 2, Rhode Island; D. H. Culton, Amarillo, Texas; John S. L. Yost, 120 Broadway, New York 5, New York; Edward H. Lange, 121 Baltimore Avenue, Kansas City, Missouri; John W. Scott, 1029 Vermont Avenue, N. W., Washington 5, D. C., Attorneys for Panhandle Eastern Pipe Line Company, Petitioner.

Appendices to Plaintiff's Trial Exhibit No. 73

Appendix "A" of this exhibit is omitted as it is the same as plaintiff's exhibit No. 2 attached to the amendment to complaint.

Appendix B of this exhibit is omitted as it is the same as plaintiff's exhibit No. 19 attached to the deposition of Leon M. Fuquay.

Appendix C of this exhibit is omitted in part, the first part being the same as plaintiff's exhibit No. 23 attached to [fol. 681] the deposition of Leon M. Fuquay. The balance of Appendix C is included here.

Laurence E. Lindsay, Reporter.

Date of Issuance: March 12, 1947.

[Stamp:] United States Court of Appeals for the District of Columbia. Filed March 24, 1947. Joseph W. Stewart, Clerk.

In the United States Court of Appeals, District of Columbia. No. 9482. Panhandle Eastern Pipe Line Company, a corporation, Petitioner, v. Federal Power Commission, Respondent.

Objections to Motion to Extend Time for Filing Transcript of Record

To the United States Court of Appeals for the District of Columbia and the Honorable Justices Thereof:

Comes now Panhandle Eastern Pipe Line Company, Petitioner herein, and files its objections to the motion of Respondent, Federal Power Commission, requesting an extension of time until May 14, 1947, for filing the transcript of the record, and respectfully represents that:

I

On February 7, 1947, Petitioner filed with the Clerk of this Court its Petition to Review herein, which fully sets out the history of the proceedings before the Federal Power Commission,[1] the orders sought to be reviewed,[2] the points on which Petitioner relies, and the objections to said orders.

A copy of the Petition to Review was duly served by mail upon a member of the Commission on February 7, 1947, and thereupon it became the statutory duty of the Commission [fol. 682] to certify and file with this Court a transcript of the record upon which the orders complained of were

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[1] Hereinafter called "the Commission."

[2] The principal order under challenge, dated November 30, 1946, is entitled "Findings and Order Issuing Certificate of Public Convenience and Necessity" and purports to authorize the construction by Michigan-Wisconsin Pipe Line Company of a natural gas pipeline which it is proposed will substantially oust Panhandle from its markets in Detroit and Ann Arbor, Michigan, and render useless a part of the capacity of the latter's facilities built and now used in serving those communities.

entered.[3] The original 40 days allowed for such purpose by Rule 38(d) of this Court expired on March 22, 1947.

II

The Commission does not allege in the motion any *incability* on its part to certify and file with the Court the transcript of the record upon which the orders here complained of were entered. The sole basis of the motion is that additional times is desired for the purpose of enabling the Commission to take further administrative action, i.e., to enable it to entertain applications which may be hereafter filed for a rehearing on opinions and a supplemental order which were issued by the Commission subsequent to the filing of the Petition to Review herein. Such subsequent opinions and orders are Opinion No. 147, issued February 7, 1947,[4] and the supplemental Opinion No. 147-A and Order issued March 12, 1947. These subsequent actions of the Commission have no bearing on the finality or reviewability of the order under challenge in this review proceeding. The Commission concedes (footnote No. 7 of its Motion) that "neither the Commission's Opinion of February 7, 1947, nor its Supplemental Opinion and Order issued March 12, 1947, are made the subject of this review." It is clear, therefore, that such subsequent opinions and orders and any applications for rehearing thereon which may hereafter be filed with the Commission and any further proceedings to be had before the Commission with respect thereto, as this Court recently pointed out in Norris & Hirshberg, Inc., v. Securities and Exchange Commission, Cause No. 9272, decided February 17, 1947, cannot be properly made a part of "the record upon which the order complained of was entered." In such decision, this Court in construing the

[3] Section 19(b) of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, Title 15, U.S.C. 177r(b) provides that a copy of the petition for review "shall forthwith be served upon any member of the Commission and *thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered.*" (Emphasis supplied).

[4] The Commission's Opinion No. 147 was issued, however, after notification by the Clerk of this Court that the Petition for Review had been filed earlier that day.

[fol. 683] review statute of the Securities and Exchange Act, containing language similar to Section 19(b) of the Natural Gas Act, stated:

"What has been said heretofore demonstrates clearly that the Congress thoughtfully and purposefully wrote into §78y that the Commission 'shall certify and file in the court a transcript of the record upon which the order complained of was entered.' Such a certificate accomplishes two things: (a) it identifies the transcript as being a true copy of the evidence actually received as such, and (b) it represents to the court that the Commission actually has considered that record, nothing more and nothing less, and upon it has entered its order.

"The transcript now before us was certified by the Commission's chief file clerk, who lacks authority to bind the Commission. Moreover, he certified it as 'the transcript of the record . . . in the matter . . . in which the orders complained of . . . were entered.' *The difference between a transcript of a record 'in which' an order was entered, and a transcript of a record 'upon which' an order was entered, may seem slight, but this case shows that the words of the statute were wisely, if not deliberately chosen.* The certification of the transcript would not be an onerous task for the Commission but, be that as it may, the performance of it is required by the Act." (Emphasis supplied.)

This decision is dispositive of the issue presented by the Commission's motion.

III

It would be clearly inappropriate and inconsistent with the requirements of Section 19(b) of the Natural Gas Act to grant an extension of time for the express purpose of enabling the Commission to include in the transcript the record of proceedings and action taken by the Commission subsequent to the date when the orders here complained of were entered. Obviously, none of such subsequent matters could possibly constitute the record upon which the orders here complained of were entered. The orders complained of and sought to be reviewed are set out in the Petition to Review as Exhibits 1 to 7, inclusive. It is to be noted that [fol. 684] the Primary Order (Exhibit 1), dated November 30, 1946, purports to grant a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line

Company authorizing the latter to construct and operate a natural gas transmission line to serve the cities of Detroit and Ann Arbor which are presently being supplied with natural gas by Petitioner and threatens to oust Petitioner from a substantial part of its established markets. The said Order was supplemented by Order dated November 30 (Exhibit 4) which is also challenged in this review proceeding. Thereafter, Petitioner filed timely applications for rehearing upon such Orders, which applications were denied by the Commission's orders of January 14, 1947 (Exhibits 6 and 7). The record upon which such orders complained of were entered was completed after oral argument on November 23, 1946. It is that record, not a record of subsequent proceedings, which the statute requires to be certified to this Court.

IV

Notwithstanding the provisions of Section 19 of the Natural Gas Act, the Commission's motion asserts that the review herein sought is premature because the Commission's order dated November 30, 1946, (here under challenge) undertook to postpone the commencement of the running of the 30-day statutory period allowed for the filing of applications for rehearing until after the subsequent Supplemental Opinion and Order of March 12, 1947, were issued. This contention does violence to the express language of such statute. Obviously, the Commission has no power to extend such statutory period. If its order of November 30, 1946, issued a certificate of public convenience and necessity as stated by the Commission, such order is final and reviewable in character. Moreover, the issue of prematurity or non-reviewability cannot be raised collaterally, as is sought here, by motion to extend the time for filing the transcript of record, but should be raised by a motion to dismiss the Petition for Review. Significantly, however, Respondent has refrained from directly seeking a determination of such issue.

Wherefore, Petitioner prays that the motion of Respond- [fol. 685] ent, Federal Power Commission, to extend the time for filing the transcript of record be dismissed and that the Court enter an order requiring said Respondent to certify and file with this Court forthwith the transcript

of the record upon which the orders complained of in the Petition to Review were entered.

John W. Scott, Attorney for Panhandle Eastern Pipe Line Company, Petitioner.

Dated at Washington, D. C., this 24th day of March, 1947.

Ira Lloyd Letts, 32 Custom House Street, Providence 2, Rhode Island; D. H. Culton, Amarillo, Texas; John S. Yost, 120 Broadway, New York 5, New York; Edward H. Lange, 1221 Baltimore Avenue, Kansas City, Missouri; John W. Scott; Harry S. Littman, 1029 Vermont Avenue, N. W., Washington 5, D. C., Attorneys for Panhandle Eastern Pipe Line Company, Petitioner.

Certificate of Service

I hereby certify that I have this day served a copy of the attached Objections to Motion to Extend Time for Filing Transcript of Record in this proceeding by personally handing a copy thereof to Mr. Bradford Ross, General Counsel, Federal Power Commission, 1800 Pennsylvania Avenue, N. W., Washington, D. C.

Dated at Washington, D. C. this 24th day of March, 1947.

Harry S. Littman, Of Counsel for Panhandle Eastern Pipe Line Company, Petitioner.

[Stamp:] United States Court of Appeals for the District of Columbia. Filed April 21, 1947, Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia. April Term, 1947. No. 9482. Panhandle Eastern Pipe Line Company, a Corporation, Petitioner, v. Federal Power Commission, Respondent. Before Edgerton, Wilbur K. Miller and Prettyman, J. J.

[fol. 686] Order

This cause coming on for consideration on the petition to review orders of respondent dated November 30, 1946, December 14, 1946, December 30, 1946, January 3, 1947, and January 14, 1947, in the above entitled case, and on respondent's motion to extend time to file the transcript of

record, and on motion of National Coal Association and the United Mine Workers of America for leave to intervene and for other relief, and the court being of opinion that the order of November 30, 1946, was not a final order because it required for completion the issuance of a supplemental order or orders, and the other orders above mentioned not being final and not having made final said order of November 30, 1946, it is now, therefore,

Ordered by the court that the petition for review herein be, and it is hereby, dismissed, without prejudice, however, to the right of petitioner to petition for review of the order of November 30, 1946, after it shall have become final by the issuance of a supplemental order or orders making same final; and it is

Further ordered by the court that, because of the dismissal of this case, the motion of the National Coal Association and United Mine Workers of America for leave to intervene and for other relief be, and it *it* hereby, denied without prejudice.

Per Curiam.

Dated April 21, 1947.

[Stamp:] United States Court of Appeals for the District of Columbia. Filed May 27, 1947, Joseph W. Stewart, Clerk.

In the United States Court of Appeals, District of Columbia. No. 9482. Panhandle Eastern Pipe Line Company, a Corporation, Petitioner, v. Federal Power Commission, Respondent.

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the [fol. 687] United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Petition to review and set aside orders of the Federal Power Commission, for leave to adduce additional evidence, and for stay.

2. Petitioner's motion for stay pending review.

3. Per curiam order denying petition for stay pending review.

4. Motion of National Coal Association and United Mine Workers of America for leave to intervene and for stay.

5. Respondent's motion to extend time for filing transcript of record.

6. Petitioner's objections to motion to extend time for filing transcript of record.

7. Per curiam order denying motion of National Coal Association and United Mine Workers of America for leave to intervene etc., and dismissing petition for review without prejudice to right of petitioner to petition for review of order of November 30, 1946 after it becomes final, etc.

8. This designation.

9. Clerk's certificate.

John W. Scott, Attorney for Panhandle Eastern Pipe Line Company, Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the attached Designation of Record in this proceeding by personally handing a copy thereof to Mr. Bradford Ross, General Counsel, Federal Power Commission, 1800 Pennsylvania Avenue, N. W., Washington, D. C.

Dated at Washington, D. C., this 26th day of May, 1947.

Harry S. Littman, of Counsel for Panhandle Eastern Pipe Line Company, Petitioner.

[fol. 688] DEFENDANTS' EXHIBIT 2

[Western Union Telegram]

WUC26 15 Collect 4 Extra Duplicate of Telephoned Telegram Stanolind Oil and Gas Co, Bartlesville Okla 2 940A

E F Bullard President=Asking Report Dly=

—924A Phillips Petroleum Co Dld F E Rice 938 AM=

Western Union Tele. Co.
Mfg. Dept. Dec 2, 1946 RC (Illegible)

924A DLD, 938 AM.

DEFENDANTS' EXHIBIT 3

[Western Union Telegram]

BV140 15 Collect Bartlesville Oka 4 153P

Legal Dept. Dec. 6, 1940

Skelly Oil Company Attn Mr. Kerr TUL
2nd Phillips Petroleum Co SGD Skelly Oil Company
Delivered 509 PM Care F E Rice

Western Union Telegraph Company

DEFENDANT'S EXHIBIT 4

Rule 13. Time—Extensions of Time—Continuances
(18 CFR 1.13)

(a) Computation of Time. Except as otherwise expressly provided by law, in computing any period of time prescribed or allowed by these rules, by any rule, regulation, or order of the Commission, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday in the District of Columbia, in which event the period shall run until the end of the next day which is not a Saturday, Sunday, or a holiday. When the period of time prescribed or allowed is 5 [fol. 689] days or less, intermediate Sundays and holidays shall be excluded in the computation. A partday-holiday shall be considered as other days and not as a holiday.

(b) Issuance of Orders. In computing any period of time involving the date of the issuance of an order by the Commission, the day of issuance of an order shall be the day the Office of the Secretary mails or delivers copies of the order (full text) to the parties or their attorneys of record, or makes such copies public, whichever be the earlier. The day of issuance of an order may or may not be the day of its adoption by the Commission. In any event, the Office of the Secretary shall clearly indicate on each order the date of its issuance.

(c) Extensions of Time. Except as otherwise expressly provided by law, whenever by any rule, regulation, or order

of the Commission, or any notice given thereunder, an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may, by the Commission or the presiding officer, be extended if application therefor is made before expiration of four-fifths of the period originally prescribed or as previously extended; and upon motion made after the expiration of the specified period, the act may be permitted to be done where reasonable grounds are found for the failure to act.

DEFENDANTS' EXHIBIT 6

[Excerpts from page 13. Federal Power Commission Rules of Practice and Regulations, effective June 1, 1938]

Sec. 1.183 Time of Filing—A petition for rehearing must be filed within 30 days after service of the order therein.

Sec. 1.184 Form and style; service.—Applications under this rule must conform to the requirements of Sec. 1.80 to Sec. 1.94.

Computation of time.

Sec. 1.190 When Sunday and holiday not included.—When the time prescribed by these rules for doing any act expires on a Sunday or a legal holiday, such time shall ex- [fol. 690] tend to and include the next succeeding day that is not a Sunday or legal holiday.

DEFENDANTS' EXHIBIT 7

United States of America. Federal Power Commission. In the Matter of Michigan-Wisconsin Pipe Line Company. Docket No. G-669.

December 17, 1946.

Notice of Order Modifying Order Issuing Certificate of Public Convenience and Necessity

Notice is hereby given that, on December 16, 1946, the Federal Power Commission issued its Order Modifying Or-

der Issuing Certificate of Public Convenience and Necessity, entered December 14, 1946, in the above designated matter.

Leon M. Fuquay, Secretary.

This is certified to be a true copy of the original.

Leon M. Fuquay.

DEFENDANTS' EXHIBIT 8

Federal Power Commission

Washington 25, December 31, 1946.

Frank L. Conrad, President, Michigan-Wisconsin Pipe Line Company, 2200 Bankers Building, 105 West Adams Street, Chicago 3, Illinois.

Re: Michigan-Wisconsin Pipe Line Company Docket No. G-669

Dear Sir: Enclosed is the order entered by the Commission on December 30, 1946, in the above entitled matter.

Very truly yours, Leon M. Fuquay, Secretary.

Enclosure. Registered

Regional Offices: Ft. Worth, Texas; Chicago, Illinois; Atlanta, Georgia; New York, N. Y.

[fol. 691] Law (2)
Div. of Gas Certificates
Publications
BH: mf
12/30/46

Docketed Dec. 31, 1946 Federal Power Commission

(Attached to the above exhibit are three sheets containing the names and addresses of a large number of companies, commissions and individuals, which list is headed by the statement "Copy of order sent to: ".)

DEFENDANTS' EXHIBIT 9

United States of America. Federal Power Commission. In the Matter of Michigan-Wisconsin Pipe Line Company. Docket No. G-669.

January 2, 1947.

Notice of Order Supplementing Order Issuing Certificate of Public Convenience and Necessity and Reopening Proceeding for Limited Purpose.

Notice is hereby given that, on December 31, 1946, the Federal Power Commission issued its Order Supplementing Order Issuing Certificate of Public Convenience and Necessity and reopening Proceeding for Limited Purpose, entered December 30, 1946, in the above-designated matter.

This is certified to be a true copy of the original.

Leon M. Fuquay, Secretary.

Received-Jan. 7, 1947 Federal Power Commission.

DEFENDANTS' EXHIBIT 10

Federal Power Commission

Washington 25, January 6, 1947.

Frank L. Conrad, President, Michigan-Wisconsin Pipe Line Company, 2300 Bankers Building, 105 West Adams Street, Chicago 3, Illinois.

[fol. 692] Re: Michigan-Wisconsin Pipe Line Company
Docket No. G-669

Dear Sir: Enclosed is the order entered by the Commission on January 3, 1947, in the above entitled matter.

Very truly yours, Leon M. Fuquay, Secretary.

Enclosure. Registered

Same letter sent Registered to:

443934

John S. L. Yost, Counsel, Panhandle Eastern Pipe Line Company, Room 1123, Equitable Bldg., 120 Broadway, New York 5, N. Y.

443935

A. J. Mayotte, Secretary, Michigan Gas Storage Company, 212 Michigan Avenue, West, Jackson, Michigan.

Regional Offices: Ft. Worth, Texas; Chicago, Illinois; Atlanta, Georgia; New York, N. Y.

Publications
Div. of Gas Certificates
Law (2)
BH: mf
1/6/47

Docketed Jan. 6, 1947 Federal Power Commission

(Attached to the above printed portion of Exhibit 10 is a list of numerous names of companies, commissions and individuals, preceded by the statement "Copy of order sent to:".)

DEFENDANTS' EXHIBIT 11

United States of America. Federal Power Commission. In the Matter of Michigan-Wisconsin Pipe Line Company, Docket No. G-669.

Notice of Order Modifying Opinion 147 and Order in Relation thereto of November 30 and Supplemental Order in Connection therewith of December 30, 1946.

[fol. 693] Notice is hereby given that, on May 8, 1947, the Federal Power Commission issued its order entered May 6, 1947, modifying Opinion 147 and order in relation thereto of November 30 and supplemental order in connection therewith of December 30, 1946, in the above-designated matter.

This is certified to be a true copy of the original.

Leon M. Fuquay, Secretary.

DEFENDANTS' EXHIBIT 12

May 7, 1947.

Mr. B. R. Kennedy, Director, The Federal Register, Room 601, The National Archives, Washington, D. C.

Re: Michigan-Wisconsin Pipe Line Company Docket No. G 669

Dear Sir: There are enclosed an original and three certified copies of the Notice in the above-designated matter. Please publish this notice in the Federal Register.

Very truly yours, Leon M. Fuquay, Secretary.

Enclosure
cc: Mr. B. R. Kennedy
BH:RP
5/7/47

DEFENDANTS' EXHIBIT 13

May 8, 1947.

Frank L. Conrad, President Michigan-Wisconsin Pipe Line Company, 2200 Bankers Building, 105 West Adams Street, Chicago 3, Illinois.

Re: Michigan-Wisconsin Pipe Line Company Docket No. G-669.

Dear Sir: Enclosed is the order entered by the Commission on May 6, 1947, in the above entitled matter.

Very truly yours, Leon M. Fuquay, Secretary.

[fol. 694] Enclosure. Registered

Docketed May 8, 1947. Federal Power Commission.

Same letter sent Registered to

(Following the words "Same letter sent Registered to" appear numerous names of individuals, commissions and companies. Other sheets attached to said exhibit contain the names of numerous companies, individuals and commissions, which list of names is preceded by the words "Copy of order sent to:".)

DEFENDANTS' EXHIBIT 15

United States of America. Federal Power Commission. Before Commissioners: Nelson Lee Smith, Chairman; Claude L. Draper, Leland Olds, Richard Sachse and Harrington Wimberly.

January 14, 1947.

In the Matter of Michigan-Wisconsin Pipe Line Company. Docket No. G-669.

Order Denying Applications for Reconsideration and Vacation, or, in the Alternative, for a Rehearing of Order Issuing Certificate of Public Convenience and Necessity.

(Docketed Jan. 14, 1947.)

It appearing to the Commission that:

(a) By its order of November 30, 1946, *the Commission* issued a certificate of public convenience and necessity, pursuant to Section 7(c) of the Natural Gas Act, as amended, to the Applicant herein, subject to compliance with certain conditions specified in said order.

(b) Paragraph (C) of said order of November 30, 1946, provides that:

For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later.

[fol. 695] (c) On December 27, 1946, Panhandle Eastern Pipe Line Company, an intervener, filed an application for reconsideration and vacation of said order of November 30, 1946, or, in the alternative, for rehearing on said order, and a stay of the order pending such rehearing. Similar applications were filed on December 30, 1946, by the National Coal Association and the United Mine Workers of America, jointly, and the City of Detroit, Michigan, each of whom were interveners herein.

(d) By its order of December 30, 1946, the Commission directed that the above-entitled proceeding be reopened for certain limited purposes and also provided for certain modifications of its order of November 30, 1946.

(e) By its order of January 3, 1947, the Commission fixed a date for further hearing in this reopened proceeding for the limited purposes specified therein.

(f) On January 10, 1947, Panhandle Eastern Pipe Line Company filed an application for reconsideration and vacation, or, in the alternative, for a rehearing of the Commission's supplemental order of December 30, 1946, and related order of January 3, 1947, and requested that the Commission stay each of said orders pending disposition of the application for vacation upon reconsideration or rehearing of the order of November 30, 1946.

(g) Neither the opinions nor the supplemental order referred to in the above-mentioned paragraph (C) of the Commission's order of November 30, 1946, have been issued.

(h) The said applications for reconsideration and vacation or rehearing of *the Commission's orders of November* 30, 1946, and December 30, 1946, are premature, in that they are filed in advance of the issuance of the supplemental order contemplated in the order of November 30, 1946, and in advance of the issuance of the Commission's opinions herein.

The Commission finds that:

(1) Good cause has not been shown for granting said applications at this time in advance of the issuance of the supplemental order contemplated by the Commission's order of [fol. 696] November 30, 1946, or the opinions herein, with respect to said order.

(2) The granting of said applications for reconsideration or rehearing with respect to the Commission's orders of November 30 or December 30, 1946, in advance of the issuance of said supplemental order and opinions would invite a multiplicity of pleadings and proceedings herein.

The Commission orders that:

(A) Said applications for reconsideration and vacation or for rehearing be and they are hereby denied without prejudice to the filing, in accordance with the provisions of paragraph (C) of said order of November 30, 1946, of other such applications for rehearing within thirty (30) days from the date of issuance of the opinions, or of the supple-

mental order contemplated in the Commission's order of November 30, 1946, whichever is later.

(B) The application of Panhandle Eastern Pipe Line Company for a stay of the Commission's orders of December 30, 1946, and January 3, 1947, be and the same is hereby denied.

By the Commission. Commissioners Draper and Olds not participating.

Leon M. Fuquay, Secretary.

Date of Issuance: January 15, 1947.

DEFENDANTS' EXHIBIT 16

United States of America. Federal Power Commission

Before Commissioners: Nelson Lee Smith, Chairman; Claude L. Draper, Leland Olds, Richard Sachse and Harrington Wimberly.

January 14, 1947.

In the Matter of Michigan-Wisconsin Pipe Line Company Docket No. G-669.

Order Denying Application of Panhandle Eastern Pipe Line Company for Rehearing of Denial of Motions to Dismiss

[fol. 697] (Docketed Jan. 14, 1947.)

Upon consideration of the application filed December 27, 1946, by the Panhandle Eastern Pipe Line Company, an intervener, for rehearing on the Commission's order of November 30, 1946, denying the several motions of Panhandle Eastern Pipe Line Company to dismiss the application of Michigan-Wisconsin Pipe Line Company at Docket No. G-669;

The Commission finds that:

Good cause for granting a rehearing on said order of November 30, 1946, has not been shown.

The Commission orders that:

Said application of Panhandle Eastern Pipe Line Company be and the same is hereby denied.

By the Commission.

Leon M. Fuquay, Secretary.

Date of Issuance: January 15, 1947.

DEFENDANTS' EXHIBIT 18

Frank L. Conrad, President, Michigan-Wisconsin Pipe Line Company, 2200 Bankers Bldg., 105 West Adams Street, Chicago 3, Illinois.

443065

Re: Michigan-Wisconsin Pipe Line Company Docket No. G-669. 100-2 Formal.

January 15, 1947.

Dear Sir: Enclosed are the orders entered by the Commission on January 14, 1947, in the above entitled matter.

Very truly yours, Leon M. Fuquay, Secretary.

Enclosure

Registered

Same letter sent Registered to:

443066

[fol. 698] John S. L. Yost, Counsel, Panhandle Eastern Pipe Line Company, Room 1123, Equitable Bldg., 120 Broadway, New York, New York.

443067

Tom J. McGrath, Atty., National Coal Association, et al, 729 15th St., N. W., Washington, D. C.

443068

James H. Lee, Asst. Corp. Counsel, City of Detroit, Michigan, City Hall, Detroit, Michigan.

443069

John W. Scott, Esq., Panhandle Eastern Pipe Line Company, 1029 Vermont Avenue, N. W., Washington, D. C.

Reg. Office: Fort Worth, Texas; Chicago, Illinois; Atlanta, Georgia; New York, N. Y.

Publications
Division of Gas Certificates
Law (2)
BH:rp
1/15/47

(Docketed Jan. 15, 1947.)

(The foregoing portion of defendants' Exhibit 18 is followed by a list of the names of numerous companies, commissions and individuals, preceded by the words "Copy of orders sent to:".).

DEFENDANTS' EXHIBIT 20

Federal Register, Tuesday, December 10, 1946

[Docket No. G-706]

Panhandle Eastern Pipe Line Co.

Notice of Findings and Order Issuing Certificate of Public Convenience and Necessity

December 3, 1946.

Notice is hereby given that on December 2, 1946, the Federal Power Commission issued its findings and order [fol. 699] issuing certificate of public convenience and necessity, entered November 30, 1946, in the above-designated matter.

Leon M. Fuquay, Secretary. [Seal]

[F. R. Doc. 46—2131; Filed Dec. 9, 1946; 8:50 A. M.]

DEFENDANTS' EXHIBIT 21

February 7, 1947.

Frank L. Conrad, President, Michigan-Wisconsin Pipe Line Company 2200 Bankers Building, 105 West Adams Street, Chicago 3, Illinois.

Re: Michigan-Wisconsin Pipe Line Company Docket No. G-669.

Dear Sir: Enclosed is a copy of Opinion No. 147 entered by the Commission on January 17, 1947.

Very truly yours, Leon M. Fuquay, Secretary.

Docketed Feb. 7. 1947.

Enclosure
Registered
Same letter sent Registered to:

(Here appears a list of the names of numerous individuals, commissions and companies. There also appears a list of numerous other individuals, commissions and companies, following the statement "Copy of Opinion sent to:".)

DEFENDANTS' EXHIBIT 24

Frank L. Conrad, President Michigan-Wisconsin Pipe Line Company, 2200 Bankers Building, 105 West Adams Street, Chicago 3, Illinois.

Re: Michigan-Wisconsin Pipe Line Company. Docket No. G-669.

Mar. 12, 1947.

Dear Sir: Enclosed is Opinion No. 147-A, together with [fol. 700] the order entered by the Commission on February 20, 1947, in the above entitled matter. The dissenting opinion of Commissioner Olds will be mailed later.

Very truly yours, Leon M. Fuquay, Secretary.

Docketed Mar. 12, 1947.

Enclosure. Registered .RDH

(Enclosure included Erratium Sheet correcting Opinion 147)

Same letter sent Registered to:

(Here appears a list of names of numerous individuals, commissions and companies. Then appears another list of different companies, individuals and commissions preceded by the statement "Copy of Opinion sent to:".)

DEFENDANTS' EXHIBIT 25

Mar. 13, 1947.

Mr. B. R. Kennedy, Director The Federal Register, Room 601, The National Archives, Washington, D. C.
By Messenger

Re: Michigan-Wisconsin Pipe Line Company. Docket No. G-669.

Dear Sir: There are enclosed an original and three certified copies of the Notice of Opinion No. 147-A and Order in the above-designated matter.

Please publish this notice in the Federal Register.

Very truly yours, Leon M. Fuquay, Secretary.

BH:fc Enclosure
8/13/47. B. R. Kennedy

[fol. 701] DEFENDANTS' EXHIBIT 26

United States of America. Federal Power Commission

In the matter of Michigan-Wisconsin Pipe Line Company. Docket No. G-669.

March 13, 1947.

Order Supplementing Order Issuing Certificate of Public Convenience and Necessity

Notice is hereby given that, on March 12, 1947, the Federal Power Commission issued its Opinion No. 147-A and order entered February 20, 1947, supplementing order issu-

ing certificate of public convenience and necessity in the above-designated matter.

Leon M. Fuquay, Secretary.

This is certified to be a true copy of the original.

Leon M. Fuquay.

DEFENDANTS' EXHIBIT 27

Mar. 21, 1947.

Frank L. Conrad, President Michigan-Wisconsin Pipe Line Company, 2200 Bankers Building, 105 West Adams Street, Chicago 3, Illinois.

Re: Michigan-Wisconsin Pipe Line Company. Docket No. G-669.

Dear Sir: Enclosed is a copy of the Dissenting Opinion of Commissioner Olds in the above-designated matter.

Very truly yours, Leon M. Fuquay, Secretary.

Enclosure. Registered.
Same letter sent Registered to:

(Here follows the names and addresses of numerous individuals, commissions and companies. In addition, there is another list of numerous other companies, individuals and commissions, which follow the statement "Copy of Opinion sent to:".)

[fol. 702] DEFENDANTS' EXHIBIT 28

United States of America. Federal Power Commission

Before Commissioners: Nelson Lee Smith, Chairman; Claude L. Draper, Leland Olds and Harrington Wimberly.

In the Matter of Michigan-Wisconsin Pipe Line Company. Docket No. G-669.

May 6, 1947.

Order Modifying Opinion No. 147 and Order in Relation Thereto of November 30 and Supplemental Order in Connection Therewith of December 30, 1946.

Upon further consideration of the Commission's order of November 30, 1946, issuing a certificate of public convenience

and necessity pursuant to Section 7 of the Natural Gas Act, as amended, authorizing the Michigan-Wisconsin Pipe Line Company to construct and operate certain transmission gas pipeline facilities, Opinion No. 147 and supplemental order of December 30, 1946;

The Commission finds that:

It is in the public interest that its order of November 30, 1946, issuing a certificate of public convenience and necessity in this matter to Michigan-Wisconsin Pipe Line Company, its Opinion No. 147 and its supplemental order of December 30, 1946, be modified as hereinafter ordered.

The Commission orders that:

The certificate of public convenience and necessity issued to the Michigan-Wisconsin Pipe Line Company by the Commission's order of November 30, 1946, its opinion in relation thereto, and supplemental order of December 30, 1946, be and the same are hereby modified and revised as follows:

(1) By changing the phrase "77,700 horsepower" appearing at page 33 of Opinion No. 147 with respect to horsepower to be added at the Hugoton Compressor Station at the end of the fifth year, to read "11,700 horsepower."

(2) By substituting the following sentence for the first sentence of the last paragraph appearing on page 34 of Opinion No. 147:

[fol. 703] "The cost estimates contain substantial allowance for contingencies and overheads (13.9% for initial construction and 10.4% for subsequent construction)."

(3) By deleting the word "firm" appearing at page 36 of Opinion No. 147, in the last sentence of the first paragraph.

(4) By revising paragraph (B)(vii) of its order of November 30, 1946, to read as follows:

"The facilities herein authorized shall not be used for the transportation or sale of natural gas subject to the jurisdiction of the Commission until Applicant submits to this Commission a schedule of rates and charges in a form satisfactory to this Commission providing for adequate and

reasonable rates and charges consistent with the public interest."

(5) By substituting the following phrase for that which precedes the tabulation in paragraph (h), page 4, of the Commission's supplemental order of December 30, 1946:

"The following tabulation illustrates the sales requirements on the Panhandle Eastern system on a zero-degree day:"

By the Commission. Commissioner Draper dissenting. Commissioner Olds not participating.

Leon M. Fuquay, Secretary.

Date of Issuance: May 8, 1947.

NOTE RE DEFENDANTS' EXHIBIT 29

Defendants' Exhibit 29 consists of three sheets, being a certified photostatic copy of original documents in the Washington, D. C., post office. The first two of said sheets are identical with plaintiff's Exhibit 50, except that each of them bears a Washington, D. C., post mark dated December 2, 1946, and the first sheet has on it in longhand the hour and minute "8:45 P. M." and "(1) C. Walker 9:35 P.".

[fol. 704] DEFENDANTS' EXHIBIT 30

United States Court of Appeals for the District of Columbia. No. 9482. April Term, 1947. Panhandle Eastern Pipe Line Company, a corporation, Petitioner, v. Federal Power Commission, Respondent.

Before: Edgerton, Wilbur K. Miller and Prettyman, JJ.

Order

This cause coming on for consideration on the petition to review orders of respondent dated November 30, 1946, December 14, 1946, December 30, 1946, January 3, 1947, and January 14, 1947, in the above entitled case, and on respondent's motion to extend time to file the transcript of record, and on motion of National Coal Association and the United Mine Workers of America for leave to intervene and for

other relief, and the court being of opinion that the order of November 30, 1946, was not a final order because it required for completion the issuance of a supplemental order or orders, and the other orders above mentioned not being final and not having made final said order of November 30, 1946, it is now, therefore,

Ordered by the court that the petition for review herein be, and it is hereby, dismissed, without prejudice, however, to the right of petitioner to petition for review of the order of November 30, 1946, after it shall have become final by the issuance of a supplemental order or orders making same final; and it is

Further Ordered by the court that, because of the dismissal of this case, the motion of the National Coal Association and United Mine Workers of America for leave to intervene and for other relief be, and it is hereby, denied without prejudice.

PER CURIAM

Dated April 21, 1947.

A true Copy, Test:

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia.

[fols. 705-706] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 707] IN UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

ARGUMENT AND SUBMISSION OF CAUSE

And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Tenth Circuit:

Record Entry: Cause Argued to Adjournment

Forty-third Day, November Term, Thursday, February 10th, A. D. 1949. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard, Charles L. Black, Esquire, W. P. Z. German, Esquire and Hawley C. Kerr, Esquire, appearing for appellants, Harry D. Turner, Esquire, and George L. Sneed, Esquire, appearing for appellee.

Thereupon argument was commenced by counsel and was continued to the hour of adjournment.

Record Entry: Argument Concluded, Cause Submitted.

Forty-fourth Day, November Term, Friday, February 11th, A. D. 1949. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on further to be heard, Charles L. Black, Esquire, W. P. Z. German, Esquire, and Hawley C. Kerr, Esquire, appearing for appellants, Harry D. Turner, Esquire, and George L. Sneed, Esquire, appearing for appellee.

Thereupon argument by counsel was concluded and the cause was submitted to the court.

In United States Court of Appeals

Opinion—March 28, 1949

Charles L. Black, W. P. Z. German and Hawley C. Kerr (Alvin F. Molony, Donald Campbell, Ray S. Fellows, Dan Moody, Walace Hawkins and Earl A. Brown on the brief) for appellants. George L. Sneed and Harry D. Turner [fol. 708] (Don Emery, Rayburn L. Foster, R. B. F. Hummer, S. E. Floren, Jr., Eugene O. Monnet, and Jack N. Hays on the briefs) for appellee.

Before Phillips, Chief Judge, and Huxman and Murrah, Circuit Judges.

Phillips, Chief Judge, delivered the opinion of the court.

Phillips Petroleum Company and Michigan-Wisconsin Pipe Line Company[1] brought this action against Skelly Oil Company, Stanolind Oil and Gas Company, and Magnolia Petroleum Company[2] for a declaratory judgment.

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[1] Hereinafter referred to respectively as Phillips, and Pipe Line Company. Collectively, they will be referred to as the plaintiffs.

[2] Hereinafter referred to respectively as Skelly, Stanolind, and Magnolia. Collectively, they will be referred to as the defendants.

From a judgment in favor of the plaintiffs, the defendants have appealed.

Federal jurisdiction is challenged. Hence, we must examine the allegations of the complaint. The alleged facts as set forth in the complaint are these:

The action arises under the Natural Gas Act,[3] and the matter in controversy between each plaintiff and each defendant exceeds, exclusive of interest and costs, the sum of $3,000.

Each of the several parties to the action, except Magnolia, is a corporation organized and existing under the laws of Delaware. Magnolia is a corporation organized and existing under the laws of Texas. Phillips, Skelly, Stanolind, and Magnolia are duly authorized to transact business in the State of Oklahoma. The actions are brought under § 274(d) of the Judicial Code, 28 U.S.C.A. § 400.[4] There is an actual controversy existing between the parties arising out of a like transaction or occurrence and in-[fol. 709] volving a question common to all parties in respect to which each plaintiff needs a declaration of its rights by the court.

During and prior to the month of December, 1945, Pipe Line Company was desirous of obtaining from the Federal Power Commission[5] a certificate of public convenience and necessity, under the requirements of the Act, for a pipeline system to be constructed and operated by it, extending from a point in the State of Texas to points in the States of Michigan and Wisconsin, or either of them, and intermediate points. In order to obtain such certificate, it was necessary that Pipe Line Company have available adequate reserves of natural gas. During that month, Phillips was negotiating a contract with Pipe Line Company which would obligate Phillips to make available to Pipe Line Company reserves of natural gas in the Hugoton Field, which extended over parts of the States of Kan-

[3] 52 Stat. 821, et seq., 15 U.S.C.A. §§ 717 to 717w, as amended, hereinafter called the Act.

[4] Now found in part in §§ 2201 and 2202 of the Revised Judicial Code.

[5] Hereinafter called the Commission.

sas, Oklahoma, and Texas, including both gas to be produced by Phillips and purchased by it from others.

On December 5, 1945, Phillips and Skelly entered into a written contract whereby Phillips agreed to purchase, and Skelly agreed to sell, gas to be produced from its properties in the Hugoton Field, consisting of leases covering approximately 46,528 acres of land. On the same date, Phillips and Stanolind entered into a written contract whereby Phillips agreed to purchase, and Stanolind agreed to sell, gas to be produced from its properties in such Field, consisting of leases covering approximately 118,000 acres. On December 7, 1945, Phillips and Magnolia entered into a written contract whereby Phillips agreed to purchase, and Magnolia agreed to sell, gas to be produced from its properties in such Field, consisting of approximately 25,000 acres. In each of such contracts, reference was made to the desire of Pipe Line Company to obtain from the Commission a certificate of public convenience and necessity, under the requirements of the Act, for the pipe-line system which it proposed to construct and operate.

[fol. 710] On December 11, 1945, Phillips entered into a contract with Pipe Line Company whereby Phillips contracted to supply Pipe Line Company with gas and obligated itself to provide gas reserves, including the gas to be purchased by it under the contracts of December 5 and 7. Pipe Line Company has an interest in the contracts of December 5, and 7.

The contract of December 11 contained the following provision:

"* * * upon the happening of any one of the following contingencies, to-wit:

"(a) the failure of Buyer to procure from the Federal Power Commission, on or before September 1, 1946, a certificate of public convenience and necessity for the construction and operation of the Pipe Line, or

"(b) the issuance by the Federal Power Commission of an order refusing to grant a certificate of public convenience and necessity for the Pipe Line, or

"(c) the failure of Buyer to Commence the actual construction of the Pipe Line on or before March 1, 1947, or

"(d) the failure of Buyer to commence, on or before January 1, 1948, the acceptance of deliveries of gas here-

under for delivery by Buyer for resale in one or more municipalities east of the Missouri River,

"Seller shall have the right to terminate this contract by written notice to be delivered to Buyer not later than thirty days after the happening of such contingency."

Each of the contracts of December 5 and 7 provides that the contract of December 11 shall contain the provision quoted above; and § 2, Article II, of each of the contracts of December 5 and 7 provides that if the contract of December 11 shall be terminated upon the happening of one of the four stipulated contingencies, then, and in either of those events, either party shall have the right to terminate "this contract by written notice to be delivered to [fol. 711] the other party * * * within thirty (30) days after the termination of the pipe line contract as aforesaid; provided, however, that, in the event this contract shall not be terminated for any of the foregoing reasons on or before October 1, 1946, and in the event * * * Pipe Line Company shall fail to secure from the * * * Commission on or before that date a certificate of public convenience and necessity for the construction and operation of its pipe line, Seller shall have the right to terminate this contract by written notice to Buyer delivered to Buyer at any time after December 1, 1946, but before the issuance of such certificate. * * *".

The contract of December 11 between Phillips and Pipe Line Company recites that Pipe Line Company "proposes to construct and operate a gas pipe line system (herein referred to as the pipe line) extending from the point of delivery * * * in the Hugoton Gas Field in Hansford County, Texas, in a northeasterly direction to points of connection with distribution systems in Wisconsin and Michigan, or either of them, and at intermediate points." The proposed pipe line was described in substantially the same language in the contracts of December 5 and 7.

Pipe Line Company, pursuant to the terms and requirements of the Act, instituted proceedings before the Commission to obtain a certificate of public convenience and necessity. In accordance with the requirements of the Act and the rules, regulations, and procedure of such Commission, adopted pursuant to the Act, and, on November 30, 1946, the Commission made an order granting such ap-

plication and "issued said certificate of public convenience and necessity" to Pipe Line Company and caused notice thereof to be given on such date. On December 2, 1946, each of the defendants sent a telegram to Phillips, which referred to its contract with Phillips, stated that no certificate of public convenience and necessity had been issued to Pipe Line Company, and that it elected to terminate and did terminate its contract with Phillips under § 2, Article II, thereof. On December 3, 1946, Phillips sent [fol. 712] a telegram to Skelly in which it stated that, prior to December 2, 1946, Pipe Line Company secured from the Commission a certificate of public convenience and necessity for the construction and operation of the pipe line, and thereby precluded Skelly's right to terminate its contract with Phillips, under § 2, Article II, thereof, and that the telegram of December 2 did not operate to terminate or cancel such contract. It sent like telegrams on the same day to Stanolind and Magnolia. Each of the defendants was asserting, in effect, that no certificate of public convenience and necessity within the requirements of the Act had been secured by Pipe Line Company from the Commission by December 2, 1946, and that accordingly each had the right to and did terminate its contract with Phillips and was no longer obligated by its contract; and that the actions and proceedings of the Commission on November 30, 1946, and prior to the telegraphic notices of cancellation did not amount to the issuance by the Commission of a certificate of public convenience and necessity. Each of the plaintiffs, on the other hand, was asserting that, prior to such notices of cancellation, a certificate of public convenience and necessity was issued by the Commission to Pipe Line Company consonant with and in compliance with the requirements of the Act and with the rules, regulations, and procedure of the Commission under the Act, which was a certificate of public convenience and necessity within the meaning of the Act and such contracts.

In their complaint, Phillips and Pipe Line Company further alleged:

"* * * that if said Natural Gas Act, and the requirements thereof, be properly construed and applied and be given appropriate effect, the actions and proceedings of said Federal Power Commission prior to any notice to the plaintiff Phillips by any of the defendants did constitute the issu-

ance to the plaintiff pipe line company by said commission of a certificate of public convenience and necessity 'within the requirements of the Natural Gas Act' and as provided for in said contract and precluded any right on the part of [fol. 713] any of the defendants to terminate its said contract between it and the plaintiff Phillips. * * *"

The prayer for relief was that the contracts between Phillips and the defendants be determined to be in effect and binding upon the parties thereto and that the defendants be enjoined from further asserting that the certificate was not issued to Pipe Line Company in accordance with the requirements of the Act and the contracts of December 5 and 7, and from asserting that they were not bound by such contracts.

The findings of the Commission in its order of November 30, 1946, in substance, are these:

Pipe Line Company proposes to serve natural gas areas within Wisconsin and a substantial demand exists for such service. Pipe Line Company also proposes to add greatly to the supplies of natural gas available for service within Michigan, where a demand for such enlarged service has been demonstrated. Panhandle Eastern Pipe Line Company[6] has reasonably met its contractual obligation to supply natural gas to Michigan Consolidated Gas Company[7] for resale in the Ann Arbor and Detroit, Michigan, service areas, and has expressed a willingness to meet the enlarged requirements of such service areas. Panhandle is entitled to reasonable protection in the service of the market in such service areas and to an opportunity to participate in its growth. While Panhandle has applied for and received authority to enlarge its facilities, which will enable it to increase its deliveries to those service areas, it has not applied for sufficient facilities or demonstrated its ability to serve adequately the needs of those service areas in addition to the expanding requirements in other areas which it supplies. Augmentation of the supply of natural gas to those service areas through the facilities proposed [fol. 714] to be constructed and operated by Pipe Line Com-

[6] Hereinafter called Panhandle, and intervener in the proceeding before the Commission.

[7] Hereinafter called Michigan Consolidated.

pany will be in the public interest, provided proper protection and recognition are given to Panhandle's rights and obligations in those service areas, and such protection and recognition should be provided for by appropriate conditions.

Pipe Line Company has secured substantial reserves of natural gas and has submitted reasonable proof of the financial and economic feasibility of its proposed construction and operation when all necessary approvals and consents shall have been secured. It has not yet obtained all the necessary approvals of operation from the State of Wisconsin, and the communities to be served therein, or of its proposed financing by the Securities and Exchange Commission. The authorization "herein granted" should be expressly conditioned upon the obtaining of all such necessary approvals. The rate structure submitted by Pipe Line Company is not satisfactory, but it has stated its willingness to comply with the requirements of the Act and the rules and regulations of the Commission thereunder. The order herein should be conditioned so as to provide for the submission of revised rate schedules.

Pipe Line Company is able and willing properly to do the acts and perform the service proposed and to conform to the provisions of the Act, as amended, and the requirements, rules and regulations of the Commission thereunder.

The proposed construction and operation of the facilities by Pipe Line Company "are required by the public convenience and necessity and a certificate therefor should be issued as hereinafter ordered and conditioned."

The order of November 30, in part, read:

"(A) A certificate of public convenience and necessity should be and it is hereby issued to Applicant, upon the terms and conditions of this order, authorizing it to:

(1) Construct and operate the following facilities:

"(a) A main natural-gas transmission on pipe-line ex- [fol. 715] tending from a point at or near Section 8, Block 1, Public Free School Land Survey, Hansford County, Texas, to its terminus at the Austin Storage Field, located near Big Rapids, Michigan, and including only the initial compressor station to be located near Section 8, Block 1, Public Free School Land Survey, Hansford County, Texas, and the com-

pressor station designated in the application, as amended, as No. 8, to be located near Mt. Pleasant, Iowa;

"(b) The so-called Wisconsin branch natural-gas transmission pipeline;

"(c) Lateral natural-gas transmission pipe-lines and appurtenances necessary to render service as proposed to the communities named in the application, as amended, excepting Mt. Pleasant, Ann Arbor, and Detroit, Michigan;

"(2) Operate the existing facilities located in the Austin and Reed City Storage Fields now owned by the Michigas Consolidated Gas Company, and including certain transmission pipelines and metering stations, as described in Schedule A of the contract between Applicant and Michigan Consolidated, dated December 4, 1945; * * *"

The order was made subject, among others, to the following conditions:

That the authorizations referred to in the findings shall be obtained from the State of Wisconsin and each of the communities proposed to be served in such state; that Pipe Line Company shall obtain approval of its proposed plan of financing by the Securities and Exchange Commission; that the facilities referred to in Paragraph (A)(2) shall not be used for the transportation or sale of natural gas subject to the jurisdiction of the Commission, except upon the approval by the Commission of lease agreements between Pipe Line Company and Michigan Consolidated, which agreements shall be filed with the Commission on or before December 16, 1946; that Pipe Line Company within six months after the "issuance of this certificate" shall submit to the Commission an adequate and reasonable schedule of rates and charges consistent with the public interest.

[fol. 716] The order also imposed the following condition:

"(B) * * *

"(viii) This certificate is granted upon the express condition that the facilities herein authorized shall not be used for the transportation for or sale of gas to the Michigan Consolidated Gas Company for resale in Detroit and Ann Arbor except with due regard to the rights and duties of Panhandle Eastern in its established service for resale in

Detroit and Ann Arbor, Michigan, under its presently existing contract with Michigan Consolidated and in accordance with the provisions of the Natural Gas Act; and such rights and duties shall by supplemental order, to be issued within fifteen days from the date of this order, be determined on the basis of:

"(1) Panhandle's rights, obligations and service under its Grandfather certificate and subsequent certificates when such certificates were granted by this Commission;

"(2) Panhandle's contractual and actual deliveries of natural gas for resale in the years 1942, 1943, 1944, 1945, and 1946;

"(3) Panhandle's rights and obligations at the date of termination of the existing contract, on December 31, 1951.

"Jurisdiction is specifically reserved by the Commission to reopen these proceedings, if need be, for the purpose of such determination.

"(ix) Applicant shall, within fifteen days after the issuance of the supplemental order herein, notify the Commission in writing whether the certificate as herein issued is acceptable to it."

The order further provided:

"(C) For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later."

[fol. 717] On December 14, 1946, the Commission adopted an order, issued December 16, which amended paragraph (B) (viii) of the order of November 30, by striking out "fifteen days" and inserting "thirty days." On December 30, the Commission adopted another order which modified and supplemented the order of November 30, by adding thereto eight additional findings, all relating to Panhandle's "grandfather" certificate and its contracts with and gas deliveries to Michigan Consolidated, and future relations between Panhandle and Michigan Consolidated. It also further ordered that the proceeding on the application of Panhandle be reopened, to be limited to the receipt of evi-

dence with respect to paragraph (B) (viii). It expressly provided in such order that nothing contained therein should be construed as changing or affecting its order of November 30, 1946, "issuing a certificate of public convenience and necessity to" Pipe Line Company.

On December 27, 1946, Panhandle filed an application for the vacation of the November 30 order, or, in the alternative, for a rehearing. Afterwards, Panhandle also filed a like application with respect to the order of December 30. Such applications were denied by the Commission, January 14, 1947, on the ground that they were premature, because of the provisions of paragraph (C) of the order of November 30.[8]

On January 17, 1947, the Commission adopted its Opinion 147, which was issued February 7, 1947. On February 20, 1947, the Commission adopted the supplemental order provided for in paragraph (B) (viii) of the order of November 30 and on the same day adopted a supplemental opinion which dealt with the matters reserved for decision in paragraph (B) (viii). Such supplemental opinion and order were issued on March 12, 1947.

In its supplementing order issued March 12, 1947, the Commission recited its "order of November 30, 1946 issuing [fol. 718] a certificate of public convenience and necessity," to Pipe Line Company and ordered that sub-paragraph (viii) of paragraph (B) thereof be supplemented in substance as follows: That the facilities authorized should not be used for the transportation or sale of natural gas in the Detroit and Ann Arbor areas except upon the following terms and conditions: That Panhandle be permitted to deliver natural gas to Michigan Consolidated in accordance with the terms and conditions of its existing contracts during the life thereof; that upon the termination of such contracts and upon mutually satisfactory terms, Panhandle be afforded reasonable opportunity to deliver and sell to Michigan Consolidated not less than the annual volumes

[8] Panhandle filed under § 19 of the Natural Gas Act, 15 U. S. C. A. §717, et seq., a petition for review of the order of November 30 in the United States Court of Appeals for the District of Columbia. On April 21, 1947, that court dismissed the petition for review on the ground that the order of November 30 was not final. Certiorari therefrom was denied by the Supreme Court, October 13, 1947.

delivered and sold by it for either the years 1942 or 1945, or the average delivery for the five-year period 1942 through 1946; that Panhandle have the rights to participate in the Detroit and Ann Arbor areas by being given the opportunity to deliver and sell such additional volumes of gas to Michigan Consolidated as the latter might require in excess of the volumes of gas then being contractually purchased by it from Phillips and Pipe Line Company in order to maintain adequate service in the Detroit and Ann Arbor areas.[9]

The pertinent provisions of the Act read as follows:

"§ 717f. • • •

"(c) No natural-gas company or persons which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. • • •

[fol. 719] "(e) • • • a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted

[9] The order of November 30 and the order supplemental thereto were sustained as between Panhandle and the Commission by the United States Court of Appeals for the District of Columbia. See Panhandle Eastern Pipe Line Company v. Federal Power Commission, 169 F. 2d 881. Certiorari was denied October 25, 1948.

thereunder such reasonable terms and conditions as the public convenience and necessity may require.

"(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. * * *"

"§ 717o. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. * * * Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. * * *"

"§ 717r.

"(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order."

[fol. 720]

I

Jurisdiction

A factual element essential in an action for a declaratory judgment is the existence of an actual controversy.[10] It was, therefore, necessary for the plaintiffs to allege the facts with respect to the claims asserted by them and the claims asserted by the defendants in order to reflect the existence of the actual controversy. It was also necessary for the plaintiffs to allege the grounds upon which they challenged

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[10] 28 U. S. C. A. § 2201;

Ohio Casualty Ins. Co. v. Marr, 10 Cir., 98 F. 2d 973, 975, and cases therein cited;

Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U. S. 270, 272;

Nashville, C. & St. P. Ry. Co. v. Wallace, 288 U. S. 249, 260;

United Public Workers of America v. Mitchell, 330 U. S. 75, 89.

See 87 A. L. R. 1205.

the claims asserted by the defendants, not as an anticipated defense to such claims, but as the basis for the claim of the plaintiffs that the adjudication of the existing controversy should be in their favor and as a part of their affirmative claim.[11]

An action for a declaratory judgment is analogous to an action to remove a cloud on title.[12] The plaintiff in an action to remove a cloud on title must allege the writing or matter which constituted the alleged cloud, the facts which give it apparent validity, and those which show its invalidity.[13] An allegation of the facts which show the invalidity of the cloud is not an anticipation or avoidance of a defense.[14] Hence, we conclude that none of the allegations in the complaint were in anticipation or avoidance of defenses.

Whether the order of the Commission of November 30, 1946, constituted a certificate of convenience and necessity to Pipe Line Company, within the requirements of the Act, [fol. 721] for the construction and operation of the pipe line described in the contracts of December 5, 7, and 11, is the primary question presented and is the gist of the existing controversy. The questions whether the telegraphic notices of December 2, 1946, effected a cancellation of the contracts of December 5 and 7, or whether such contracts remain in force were wholly dependent upon the determination of the primary question. If the primary question is resolved in favor of the plaintiffs, the defendants do not dispute that such contracts remain in force. If it is resolved in favor of the defendants, the plaintiffs do not dispute that the contracts were effectively cancelled. Therefore, the action is to secure an adjudication of an existing controversy with respect to such primary question. It is not an action to enforce or to construe the contracts of December 5 and 7, or for the breach thereof. It is not a claim arising out of,

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[11] Ter Haar v. Kettlemen North Dome Ass'n, D. C. Cal., 34 F. Supp. 823, 824.

[12] Davis v. American Foundry Equipment Co., 7 Cir., 94 F. 2d 441, 443.

[13] Hopkins v. Walker, 244 U. S. 486, 490, 491.

[14] Hopkins v. Walker, 244 U. S. 486, 490, 491; Lancaster v. Kathleen Oil Co., 241 U. S. 551, 554, 555.

or dependent upon, state law. Rather, it is a claim arising out of, and dependent upon, the construction and application of Federal law, to wit, the Act and valid rules and regulations of the Commission promulgated thereunder. The regulations and rules promulgated by a Commission pursuant to its statutory authority have the force and effect of Federal law.[15] Hence, we do not regard Federal jurisdiction as dependent upon the rulings in Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 199-201; and Brushaber v. Union Pacific RR. Co., 240 U. S. 1, 10, approved in Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 320, 321.

Title 28 U. S. C. A. § 41, in effect when the judgment was entered herein, provided:

"The district courts shall have original jurisdiction • • •

"(1) • • • Of all suits of a civil nature, at common law or in equity, • • • where the matter in controversy exceeds, exclusive of interest and costs, the sum or value [fol. 722] of $3,000, and (a) arises under the Constitution or laws of the United States, • • •"

To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element and an essential one of the plaintiff's cause of action; the right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction and effect and defeated if given another; a genuine and present controversy, not merely a possible or conjectural one, must exist with respect thereto; and the controversy must be disclosed from the face of the complaint unaided by the answer.[16]

For the reasons indicated above, we think the instant case comes within those tests and that the district court had jurisdiction.

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[15] Regents of New Mexico College v. Albuquerque Broadcasting Co., 10 Cir., 158 F. 2d 900, 906.

[16] Gulley v. First National Bank in Meridian, 299 U. S. 109, 112-114;

Regents of New Mexico College v. Albuquerque Broadcasting Co., 10 Cir., 159 F. 2d 900, 907, and cases cited in Notes 13, 14, 15 and 16, thereof.

II

The Merits

It will be noted that the Commission, in its findings incorporated in the order of November 30, 1946, found every fact prerequisite under the terms of the Act to the issuance to Pipe Line Company of a certificate of public convenience and necessity for the construction and operation of the pipe line described in each of the contracts, and that the order in the present tense states "a certificate of public convenience and necessity be and it is hereby issued to" Pipe Line Company upon the terms and conditions set forth in the order. Moreover, in its orders of December 14 and December 30, 1946, and March 12, 1947, it refers to the order of November 30, 1946, as an order "issuing a certificate of public convenience and necessity" to Pipe Line Company and, in the order of December 30, it expressly provides that nothing therein contained shall be [fol. 723] construed as changing or affecting the Commission's order adopted November 30, 1946, "issuing a certificate of public convenience and necessity" to Pipe Line Company.

An intent to grant such certificate on November 30, 1946, to be immediately effective, seems clear from the language of that order and the orders issued subsequent thereto.

A certificate of public convenience and necessity under the Act is permissive, rather than contractual, in character. The verb "issue" means "to set forth, to emit, to go forth authoritatively" [17]

The question is whether the terms and conditions imposed prevented the certificate from becoming effective on November 30, 1946.

The Act expressly provides that if the facts prescribed therein are found, a certificate shall be issued, and that the Commission shall have power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder, such reasonable terms and conditions as the public convenience and necessity may require.

The duty of the Commission to issue the certificate followed the prerequisite findings which it made. The right

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[17] Webster's New International Dictionary, 2d Ed.; Blythe v. Dulaney, 9 Cir., 73 F. 2d 799, 803.

to attach reasonable terms and conditions was within the granted powers of the Commission. The Commission has followed a practice of issuing certificates and attaching terms and conditions, to the exercise of the rights granted, to be complied with thereafter.

The contracts of December 5 and 7 did not provide for the issuance of an unconditional certificate. Neither did they require that conditions, if imposed, should be complied with on or before December 1, 1946. In ascertaining whether the conditions imposed were conditions precedent to the issuance of the certificate, or conditions subsequent thereto and to be complied with after issuance, we should examine the nature of the acts to be done and the intention of the Commission as manifest by the language of its order.[18] The conditions imposed were conditions to the exercise of the rights granted. The language of the order plainly manifests an intent to grant a certificate immediately effective. The authorizations to be obtained from the State of Wisconsin and from municipalities of such state would have been useless to Pipe Line Company without the certificate from the Commission. It is reasonable to assume that the state and municipalities would not desire to grant local authorizations until Pipe Line Company had obtained from the Commission a certificate for the construction and operation of the pipe line. Likewise, lease agreements between Pipe Line Company and Michigan Consolidated could not be finally entered into until Pipe Line Company had obtained from the Commission a certificate for the construction and operation of the pipe line.

[fol. 724]

The Act does not require the Commission to approve the plan of financing. The American Light and Traction Company, the parent of Pipe Line Company, was a regulated holding company and, therefore, it was necessary to secure the approval of Pipe Line Company's proposed plan of financing by the Securities and Exchange Commission under the Public Utility Act of 1935. But, it was not a prerequisite that such approval should be obtained from the Securities and Exchange Commission prior to the issuance of the certificate. Both such certificate and ap-

[18] Finlay v. King, 3 Pet. 346, 376, 377; In re Assessment of Alleged omitted Property, — Okl. —, 58 P. 2d 134, 136; Wellsville Oil Co. v. Miller, 44 Okl. 493, 145 P. 344, 348.

proval were mutually necessary to the other, but it was not essential that they be obtained simultaneously.[19]

It was not necessary that Pipe Line Company's rate schedule be approved before the issuance of the certificate. Under the Act, the Commission had power from time to time to examine and reexamine rate schedules and deter- [fol. 725] mine just and reasonable rates and charges. Had a rate schedule been approved at the time of the issuance of the certificate, it would have been subject to change thereafter.

It is our conclusion that none of the conditions above referred to were conditions precedent to the issuance of the certificate and that they were conditions to be fulfilled after its issuance.[20]

The Act expressly authorizes the Commission to "determine the service area to which each authorization" under the certificate of public convenience and necessity is to be limited. The contracts did not provide for a certificate of public convenience and necessity for the construction of a pipe line to, and the operation thereof in, the Detroit and Ann Arbor service areas. The requirement of the contracts was a certificate for the construction and operation of a pipe line from the designated point in Texas to Wisconsin and Michigan, or either of them, and intermediate points. Such requirement would have been fulfilled had the Commission entirely excluded the Detroit and Ann Arbor service areas, notwithstanding such areas will provide a very substantial part of the market for the gas which Pipe Line Company will transport and resell.

The Commission attached to its certificate a general condition with respect to the Detroit and Ann Arbor areas, namely, that the transportation of gas for or sale to Michigan Consolidated for resale in the Detroit and Ann Arbor service areas should be with due regard to the rights and duties of Panhandle in such areas, to be thereafter determined by supplemental order on the basis set forth in paragraph (B) (viii) (1), (2), and (3), of its order of Novem-

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[19] See Panhandle Eastern Pipe Line Co. v. Federal Power Commission, C. A. D. C., 169 F. 2d 881, 883.

[20] Panhandle Eastern Pipe Line Co. v. Federal Power Commission, C. A. D. C., 169 F. 2d 881.

ber 30. Here, again, we do not think the condition imposed was precedent to the issuance of the certificate, but, rather, a condition subsequent with respect to such service areas, to be more particularly defined on the basis stated by supplemental order of the Commission. Plainly, the condition imposed was not one with respect to the issuance of [fol. 726] the certificate, but with respect to the future exercise of rights granted under the certificate.

Section 717r of the Act provides that a petition for rehearing may be applied for within thirty days after the issuance of an order. If the Commission intended, as it seems clear to us that it did, to issue a certificate effective on November 30, 1946, but, by the provisions of paragraph (C), intended to extend the time generally for filing a petition for rehearing beyond the period of thirty days from November 30, 1946, and until its supplemental opinion and order with respect to the Detroit and Ann Arbor service areas had been filed, then it may be doubted that paragraph (C) is valid.

It seems obvious to us that the Commission did not intend, by paragraph (C), to undertake to extend the time for filing a petition for rehearing other than with respect to the limitations imposed with respect to the Detroit and Ann Arbor service areas by paragraph (B) (viii), to be more particularly defined by supplemental order. If such was the intention of the Commission, paragraph (C) is valid, and, since the matters reserved had to do, not with the issuance of the certificate, but with the future exercise of rights granted thereunder, paragraph (C), so construed, does not conflict with the prior language of the order indicating an intent on the part of the Commission to issue a certificate immediately effective.

In the Act, the terms "issued" and "granted" are used synonymously. Section 717f(e) of the Act provides that if such findings are made "a certificate shall be issued." We hold that the issuance of a certificate constitutes a grant thereof.

The Skelly contract of December 5, 1945, gave Skelly the right to terminate such contract by written notice to Phillips "at any time after December 1, 1946, or before the issuance of such certificate." The contracts with Stanolind and Magnolia contained like provisions. It is to be noted that such contracts did not provide "before the issuance"

[fol. 727] and "acceptance" of such certificate. Accordingly, we conclude that if the certificate was issued on or before December 1, 1946, right to terminate did not insure, although acceptance was subsequent to that date.

The instant action was filed July 15, 1947. On May 20 and 21, 1947, respectively, Skelly and Stanolind filed separate actions in the district court of Travis County, Texas, against Phillips, in which each sought a declaratory adjudication that its contract with Phillips had been terminated and that it was no longer obligated by its contract. Both actions were removed by Phillips to the United States District Court for the Western District of Texas. Skelly interposed a motion to dismiss or abate the instant action because of the pendency of its prior action brought in the state court of Texas. Stanolind interposed a like motion.

The actions brought by Skelly and Stanolind sought only a personal judgment and were actions in personam. It is well settled that where two actions involving the same cause of action are pending in a state and Federal court, and are within the concurrent jurisdiction of each, both actions, in so far as they seek relief in personam, may proceed at the same time, and, when one action has gone to final judgment, that judgment may be set up as a bar in the other action under the doctrine of res judicata.[21]

The controversy was not one which could be better settled in the actions brought by Skelly and Stanolind. Magnolia was not a party to those actions. The controversy could be adjudicated as to all of the parties in interest in the instant action. The controversy involves the construction and application of Federal law. The entire controversy can be determined more conveniently and with more facility in the instant action.[22]

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[21] Guardian Life Ins. Co. of America v. Kortz, 10 Cir., 151 F. 2d 582, 585; Wells v. Helm, 10 Cir., 105 F. 2d 402, 404; Princess Lida of Thurn and Taxis v. Thompson, 305 U. S. 456, 465, 466; Penn General Casualty Co. v. Commonwealth of Pennsylvania, 294 U. S. 189, 195; Kline v. Burke Construction Co., 260 U. S. 226, 230.

[22] Franklin Life Ins. Co. v. Johnson, 10 Cir., 157 F. 2d 653, 656, 657. Cf. Brillheart v. Excess Ins. Co., 316 U. S. 491, 494.

[fol. 728] We conclude that the trial court did not abuse its discretion in overruling such motions.

Affirmed.

IN UNITED STATES COURT OF APPEALS

JUDGMENT—March 28, 1949

Sixty-ninth Day, November Term, Monday, March 28th, A. D. 1949. Before Honorable Arie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

On April 11, 1949, an order was entered extending the time for a petition for rehearing to April 30, 1949.

IN UNITED STATES COURT OF APPEALS

APPELLANTS' PETITION FOR REHEARING—Filed April 30, 1949

To the Honorable the United States Court of Appeals for the Tenth Circuit—

Skelly Oil Company, Stanolind Oil and Gas Company, and Magnolia Petroleum Company, appellants in the above styled and numbered cause, respectfully present this their Petition for Rehearing and in this behalf submit the following grounds:

Jurisdiction

1. The Court erred in holding that this action is one arising under the laws of the United States and that therefore the court below had original jurisdiction to hear and determine the same.

[fol. 729] 2. The Court erred in analogizing this cause for jurisdictional purposes to a suit to remove cloud from title and erred in that connection in holding that the defenses upon which the defendants in a declaratory judg-

ment action rely constitute a part of the plaintiff's case or cause of action.

3. The Court erred in holding, in effect, that original Federal jurisdiction exists under the facts of this case to try a declaratory judgment action and enter judgment therein, even though if the suit had been brought as one to enforce the contracts by a suit for damages or specific performance or other relief of a coercive character, jurisdiction would not have existed.

4. The Court erred in holding that this suit is not an action to enforce or construe the contracts of December 5 and 7, and in that connection that it "is not a claim arising out of or dependent upon State law" but "is a claim arising out of and dependent upon the construction and application of Federal law, to-wit, the Act and valid rules and regulations of the Commission promulgated thereunder."

5. The Court erred in holding that none of the allegations in the complaint were in anticipation or avoidance of defenses and that therefore the case does not fall within the rule that denies jurisdiction where it is sought to be shown by an anticipation and avoidance of defenses.

6. The Court erred in holding that the District Court did not abuse its discretion in overruling the motions of Skelly and Stanolind to dismiss or abate because of the pendency of other actions in the District Court of the United States for the Western District of Texas, previously filed and seeking declaratory relief in respect to the same controversy; or in the alternative, to stay this action until the other actions were disposed of.

The Merits

7. The Court erred in holding that the order of the Federal Power Commission dated November 30, 1946, was such an order as satisfied the contracts and was such an order as was contemplated by the parties when they provided in [fol. 730] the contracts that if no certificate of public convenience and necessity was issued on or prior to December 1, 1946, the appellants should have the right to terminate the contracts by giving the notices which were given on December 2, 1946.

8. The Court erred in holding that a certificate within the meaning of the contracts was issued on November 30, 1946, and in failing to hold in that connection that the November 30, 1946, order was not final or effective but was held in suspense by its own terms until the completion of required administrative action, the last step of which did not occur until March 12, 1947.

9. The Court erred in holding, contrary to the terms of the order of November 30, 1946, which required actual written acceptance of the order by Michigan-Wisconsin Pipe Line Company, that the order became effective November 30, 1946, and prior to such acceptance.

10. The Court erred in failing to give proper legal effect to the fact that the Court of Appeals for the District of Columbia (having exclusive authority to review orders of the Federal Power Commission and to determine the nature and status of such orders) decided, in the first suit, review proceeding, brought by Panhandle Eastern against the Federal Power Commission, that said order of November 30, 1946, was not a final order in any respect, which legal effect was that said order did not grant or issue a certificate on November 30, 1946.

11. The Court erred in failing to hold that the adjudication made by the Court of Appeals for the District of Columbia in the first Panhandle Eastern suit against the Commission (the Supreme Court denying certiorari) fixed the nature and status of the order of November 30, 1946, as not being in any respect a final order and as representing only incomplete administrative action, and therefore as one which was not then effective to grant or issue a certificate.

12. The Court erred in failing to hold that the adjudication referred to in grounds 10 and 11 above constituted a conclusive adjudication, binding on the Commission and [fol. 731] Michigan-Wisconsin, and that it became the law of the case in the proceedings for a certificate, in Docket G-669, and by reason of the provisions of appellants' contracts with appellee was conclusive on appellee in this action of the question as to whether a certificate was issued on November 30, 1946.

13. The Court erred in holding that paragraph (C) of the November 30 order was effective only to extend the time

for filing a petition for rehearing "with respect to the limitations imposed with respect to the Detroit and Ann Arbor service areas by paragraph (C) (viii), to be more particularly defined by supplemental order," and in failing to hold that said paragraph (C) had the effect of withholding and suspending the order as a whole and hence that said order was not in any respect final or effective or subject to applications for rehearing filed within thirty days after November 30, 1946, as the first step for a review thereof.

14. The Court erred in holding that the conditions (ii), (iii), (v), (vi), (viii) and (ix) (R. 442-444) contained in the November 30 order were conditions attached to the exercise of rights granted under the certificate, and in not holding that each thereof was a condition attached to the issuance of the certificate and was a condition precedent to its effectiveness.

15. The Court erred in holding that the appellants' contracts were not terminated on December 2, 1946, and in not holding that they were terminated on said date.

The appellants before named pray that this Petition for Rehearing be granted and that the former judgment of this Court be vacated and that the judgment of the District Court be reversed.

Respectfully submitted, W. P. Z. German, Alvin F. Molony, Hawley C. Kerr, Attorneys for Appellant, [fol. 732] Skelly Oil Company; Donald Campbell, Ray S. Fellows, Charles L. Black, Dan Moody, Attorneys for Appellant, Stanolind Oil and Gas Co.; Walace Hawkins, Earl A. Brown, Dan Moody, Attorneys for Appellant, Magnolia Petroleum Company.

Certificate of Counsel

I certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

W. P. Z. German.

Filed April 30, 1949.

IN UNITED STATES COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—May 9, 1949

First Day, May Term, Monday, May 9th, A. D. 1949. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the petition of appellants for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

IN UNITED STATES COURT OF APPEALS

NOTE RE MANDATE

On May 20, 1949, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

[fol. 733] IN UNITED STATES COURT OF APPEALS

STIPULATION RE RECORD—Filed June 2, 1949

At the request of counsel for the appellants who have informed counsel for appellee of the intention of appellants to apply to the Supreme Court of the United States for a writ of certiorari in the above entitled cause, it is agreed:

1. (a) The hereinbelow copied additional excerpts from plaintiff's Exhibit No. 1 contained in the unprinted transcript of the record in the District Court filed in the Court of Appeals (other excerpts from which are contained in the printed record herein at pages 394 to 398) shall, by the printing of this stipulation containing said excerpts as an addition to the printed record herein, be included in the record to be filed in the Supreme Court. Said unprinted additional excerpts were referred to by counsel for appellants in their Brief in Support of Appellants' Petition for Rehearing in the Court of Appeals, such reference having

been permitted by the provisions of the stipulation of counsel approved by the court contained in the printed record at pages 1 and 2.

(b) Said additional excerpts are the following docket entries of the Federal Power Commission in its Docket G-669, In the Matter of Michigan-Wisconsin Pipe Line Company:

1947

. . . . . .

Feb. 10 Received service on Chairman Smith of certified copy of Petition of Panhandle Eastern Pipe Line Company to Review and Set Aside Orders of the Commission entered 11/30/46; 12/14/46; 12/30/46; 1/3/47; 1/14/47 (2); for Leave to Adduce Additional Evidence, and For Stay, filed 2/7/47 in the USCA, District of Columbia, No. 9482.

. . . . . .

April 10 Filed Application of intervening railroads (Western Railroads) for Reconsideration and Abrogation of Order, entered 11/30/46, as modified, or in the alternative, For Rehearing, together with certificate of Amos M. Mathews showing service thereof on parties of record on 4/8/47.

April 10 Filed Application of Panhandle Eastern Pipe [fol. 734] Line Co. for Reconsideration and Vacation of order entered 11/30/46, as modified; order of 1/3/47; and Opinions 147 and 147-A, or in the alternative for Rehearing, together with certificate of John W. Scott showing service thereof on parties of record on 4/10/47.

Apr. 11 Filed Application of the City of Detroit for Reconsideration and Vacation of order entered 11/30/46, as modified; order of 1/3/47; opinions 147 and 147-A; or in the alternative, For Rehearing thereon, together with certificate of James H. Lee, showing service thereof on parties of record on 4/11/47.

Apr. 11 Filed Application of the National Coal Association and United Mine Workers of America for Reconsideration, Revocation and Abrogation of order entered 11/30/46, as modified; order of 1/3/47; opinions 147 and 147-A; or, in the alternative, for Rehearing thereon, together with certificate of Tom J. McGrath, showing service thereof on parties of record 4/11/47.

Apr. 11 Filed Application of Lake Michigan Docks Association, et al., for reopening, reconsideration, Rehearing and rescission of Findings and Order entered 11/30/46, together with certificate of Philip H. Porter showing service thereof on parties of record on 4/9/47.

. . . . . .

July 3 Received service on Chairman Smith of certified copy of Petition of Panhandle Eastern Pipe Line Company to Review and Set Aside Orders entered 11/30/46; 12/14/46; 12/30/46; 1/3/47; 1/14/47; Opinion No. 147; Supp. Opinion No. 147-A; order of 3/12/47, and Denial of Petitioner's Application for Reconsideration and Vacation of above orders, entered 1/14/47, and For Leave to Adduce Additional Evidence, filed 7/2/47 in the USCA, District of Columbia. (#9588)

2. The remaining unprinted portions of the transcript of record in the District Court may be omitted from the record for the Supreme Court and the abbreviated record as originally printed for the Court of Appeals, with the aforesaid [fol. 735] additions thereto and the addition thereto of the record of the proceedings and the opinion in the Court of Appeals, shall constitute the record in said case to be filed with appellants' petition for a writ of certiorari, and the Clerk of the Court of Appeals may certify it as the transcript of the record in the case in the Court of Appeals.

Dated this the 26th day of May, 1949.

W. P. Z. German, Alvin F. Molony, Hawley C. Kerr, Donald Campbell, Ray S. Fellows, Charles L. Black, Dan Moody, Walace Hawkins, Earl A. Brown, Attorneys for Appellants, By W. P. Z. German, Ray S. Fellows. Don Emery, Rayburn L. Foster, R. B. F. Hummer, H. K. Hudson, George L. Sneed, Harry D. Turner, S. E. Floren, Jr., Eugene O. Monnet, Jack N. Hays, Attorneys for Appellees, By Harry D. Turner.

Filed June 2, 1949.

[fol. 736] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 737] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 221

SKELLY OIL COMPANY, et al., Petitioners,

vs.

PHILLIPS PETROLEUM COMPANY

ORDER ALLOWING CERTIORARI—Filed October 17, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following Regents of the University System of Georgia vs. Carroll, No. 83.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.